SUPREME COURT, U. S.

MAR 31 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1237

RICHARD E. BROWN and DAVID L. TAYLOR, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

UNITED STATES OF AMERICA, SECRETARY OF DEFENSE, SECRETARY OF THE NAVY, CHIEF OF NAVAL OPERATIONS, CHIEF OF NAVAL PERSONNEL, COMMANDANT OF THE MARINE CORPS, JUDGE ADVOCATE GENERAL OF THE UNITED STATES NAVY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners, Richard E. Brown and David L. Taylor, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Third Circuit entered on December 31, 1974. That decision affirmed by a vote of two to one the order of the United States District Court for the Eastern District of Pennsylvania granting summary judgment for defendants against petitioners' claim for their statutory pay and correction of their military records. The Court of Appeals held that the judgments of courts-martial by which petitioners had been convicted constituted a complete defense, even though such judgments had been rendered by tribunals that were concededly without jurisdiction.[1] Judge Garth dissented on the ground that "a decision by a military tribunal incompetent to adjudicate is a nullity", to which no legally operative effect may be given (A92). The Court of Appeals denied a petition for rehearing *in banc* on January 31, 1975, Judge Gibbons dissenting.

The opinions of the panel judges of the Court of Appeals and the denial of rehearing in banc are not yet officially reported. They are printed in the Appendix as follows:

1. Opinion of Judge Hunter of December 31, 1974, announcing the affirmance of the judgment of the district court, at A44.

2. Concurring opinion of Judge Adams of December 31, 1974, at A61.

3. Dissenting opinion of Judge Garth of December 31, 1974 at A89.

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1. The term "jurisdiction" is used herein in the sense of a tribunal's authority or power to adjudicate; not in reference to any constitutional or other defect in the proceedings.

4. Order of January 24, 1975, amending the Opinion of Judge Adams, at A102.

5. Denial of rehearing *in banc* (dated January 31, 1975) at A103.

The opinion of the District Court in this matter is reported at 365 F. Supp. 328 (E. D. Pa. 1973), and is printed in the Appendix at A1.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered December 31, 1974. A timely petition for rehearing, containing a suggestion for rehearing *in banc*, was filed January 14, 1975, and was denied January 31, 1975. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. May legally operative effect be given to judgments of improperly convened courts-martial, which proceeded without jurisdiction, so as to deprive plaintiffs of property and other rights solely on the basis of such judgments?

2. Should summary judgment have been granted in favor of defendants, thereby denying plaintiffs relief including recovery of forfeited pay and correction of their records, when plaintiffs were tried by invalidly convened military tribunals, purporting to be courts-martial, but which were admittedly without power to adjudicate?

3. May judicial decisions holding certain courts-martial to be without power to adjudicate be limited to prospective application only?

4. May judicial decisions holding an implementing regulation to conflict with the governing statute properly be limited to prospective application?

5. Should the decision of the United States Court of Military Appeals in *United States v. Ferry*, 22 USCMA 339 (1973) (holding that court's prior jurisdictional decisions to apply retroactively) be denied collateral estoppel effect where the litigants in *Ferry* were the same as those in this case and where defendants in this case initiated the *Ferry* proceedings in order to obtain a ruling for use in this case?

6. Should the class have been limited to persons tried under § 0103(b)(5) of the Manual of the Judge Advocate General of the Navy in a particular time period, when other members of the class as alleged in the Complaint were tried during a broader time period by special courts-martial that lacked jurisdiction for the same reason as those conducted under § 0103(b)(5)?

CONSTITUTIONAL AND STATUTORY PROVISIONS, REGULATIONS, AND PROCEDURAL RULE INVOLVED.

The constitutional provision involved is the Due Process Clause of the Fifth Amendment to the United States Constitution. The statutory provisions involved are the Uniform Code of Military Justice, Articles 23(a)(7), and 76, 10 U. S. C. §§823(a)(7), 876; the Tucker Act, 28 U. S. C. §1346(a)(2); 28 U. S. C. §1361; and 37 U. S. C. §204(a). The regulations involved are the Manual For Courts Martial (1969 Rev.) ¶¶8, 68(b)(1); and the Manual of the Judge Advocate General of the Navy, §0103(b). The procedural rule involved is Rule 23, Federal Rules of Civil Procedure.

The Due Process Clause of the Fifth Amendment provides:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Article 23(a)(7) of the Uniform Code of Military Justice provides:

> "Special courts-martial may be convened by—(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned."

At the time in question, the Manual of the Judge Advocate General of the Navy ("JAG Manual") provided, at §§0103(b)(4) and (5):

> "*Special courts-martial*—In addition to those officers otherwise authorized by Article 23(a)(1) through (6) of the Code, the following officers are, under the authority granted to the Secretary of the Navy by Arti-

cle 23(a)(7) of the Code, empowered to convene special courts-martial:

> "(4) All commanding officers of enlisted personnel now or hereafter designated pursuant to article 0514, U. S. Navy Regulations, by a commander (including the commander of a multiservice command to which members of the naval service are attached).
>
> "(5) All commanding officers and officers in charge of commands now or hereafter designated as separate or detached commands by a flag or general officer in command (including the commander of a multiservice command to which members of the naval service are attached)."

Paragraph 8 of the Manual for Courts-Martial provides:

> "The jurisdiction of a court-martial—its power to try and determine a case—and hence the validity of each of its judgments, is conditioned upon the following requisites: That the court was convened by an official empowered to convene it; that the membership of the court was in accordance with the law with respect to number and competency to sit on the court; and that the court was invested by an act of Congress with power to try the person and the offense charged."

Paragraph 68(b)(1) of the Manual for Courts-Martial provides:

> "If the court lacks jurisdiction . . . the proceedings are a nullity. These objections cannot be waived and may be asserted at any time."

The Tucker Act, 28 U. S .C. § 1346(a)(2) provides:

"The district courts shall have original jurisdiction, concurrent with the Court of Claims, of: . . .

"Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . ."

28 U. S. C. § 1361 provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The texts of 10 U. S. C. § 876, 37 U. S. C. § 204(a), and of Rule 23, Federal Rules of Civil Procedure, are set forth in the Appendix at A105, A105, and A106, respectively.

STATEMENT OF THE CASE.

This is an action for back pay [2] and for correction of military records [3] on behalf of a plaintiff class of several thousand former servicemen who were tried and sentenced

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2. The action for back pay is founded upon the Tucker Act, 28 U. S. C. § 1346(a)(2), which vests in the District Courts and the Court of Claims concurrent jurisdiction over such claims less than $10,000 in amount. See *Runkle v. United States*, 122 U. S. 543 (1887); *Swaim v. United States*, 165 U. S. 553 (1897).

3. The claim for correction of records is based upon a prayer for relief in the nature of mandamus, founded upon 28 U. S. C. § 1361. See *Ashe v. McNamara*, 355 F. 2d 277 (1st Cir. 1965) (Hastie, J.); *Flemings v. Chaffee*, 330 F. Supp. 193 (E. D. N. Y. 1971), *aff'd*, 458 F. 2d 544 (2d Cir. 1972), *rev'd on other grounds*, 413 U. S. 665 (1973).

for minor offenses[4] by special courts-martial that lacked jurisdiction because the commanding officers who convened such courts-martial were not authorized by law to do so.

By law, the particular courts involved could be established only by direct authority from the Secretary of the Navy to the convening officer. In this case, no such authority was granted. Rather, the convening officers received authority which the Secretary attempted unlawfully to delegate through various admirals and generals.

The sole defense asserted in response to plaintiffs' claims in this action was the judgments of the foregoing courts-martial.

It is undisputed that the tribunals that tried plaintiffs and the members of the class were without jurisdiction (in the sense of the power to adjudicate); yet the court below gave effect to the judgments of such tribunals to bar plaintiffs from all relief with respect to the punishment imposed upon them, thus abrogating the fundamental concept of Anglo-American jurisprudence that the judgment of a court without jurisdiction is null and void, and of no legal effect.

A. The Proceedings in the Court of Military Appeals.

The legal foundation for plaintiffs' claim was established by the United States Court of Military Appeals in its decisions holding that the Secretary of the Navy's power to designate special court-martial convening authorities pursuant to Article 23(a)(7) of the Uniform Code of Military Justice,[5] 10 U. S. C. § 823(a)(7), is non-delegable, and must be exercised by the Secretary personally. The

4. By statute special courts-martial may not impose more than six months imprisonment. Article 19, UCMJ, 10 U. S. C. § 819. Offenses deemed to merit more severe punishment are referred to general courts-martial for trial.

5. Hereinafter cited as "UCMJ".

Court held that the proceedings of courts-martial convened pursuant to delegated authority are without jurisdiction and therefore null and void. *United States v. Greenwell*, 19 USCMA 460 (1970); *United States v. Cunningham*, 21 USCMA 144 (1971).[6]

The Court of Military Appeals held in *Greenwell* that because § 0103(b)(5) of the JAG Manual provided for delegated convening authority, the regulation was contrary to the governing statute (Article 23, UCMJ) and was therefore void. The Court stated:

> "[I]nasmuch as we believe that . . . [the Secretary's] personal action is an absolute prerequisite, we must hold that the court-martial which convicted this accused was without jurisdiction to proceed and, hence, was a nullity." 19 USCMA at 463.

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6. The decision who may exercise the important power of convening special courts-martial is more than the clerical nicety the judges of the panel majority took it to be. The convening authority of a military court-martial is not a lawyer. Nonetheless he not only exercises prosecutorial discretion in deciding what persons and charges should be brought to trial, but he also appoints the members of the jury, the judge, and the prosecution and defense counsel, reviews interlocutory decisions of the judge, and is the first appellate tribunal to review the convictions and sentences of his courts. UCMJ, Articles 25(d)(2), 26(a), 27(a), 34, 60, 62(a), 10 U. S. C. §§ 825(d)(2), 826(a), 827(a), 834, 860, 862(a); see *Priest v. Koch*, 19 USCMA 293 (1970). By definition, this quadri-partite prosecutorial-judicial authority is the very same officer charged with maintaining military discipline in his unit.

The departure from the statute in this case resulted in the grant of purported convening authority to the tiniest of units at the bottom of the chain of command—not only companies, but sub-units of companies (consisting of as few as 30-40 men)—where the opportunities for command influence and other unfairness were rife. For example, one witness testified before a House Subcommittee that in trials before a small command of which he had been a member, the convening authority had pre-ordained both the outcome and sentence of every single trial. See Hearings on H. R. 2575 before Subcommittee No. 11 (Legal), House Committee on Armed Services, 80th Cong., 1st Sess. 2035 (1947). See generally Moyer, Justice And The Military, §§ 3-100 to 3-400 (1972) (and the numerous authorities cited therein).

The court concluded that the delegation at issue was:

> "contrary to the law and of no legal effect. Courts-martial convened under that authority are a nullity." *Id.* at 464.

By the same reasoning, and using virtually identical language, the court found § 0103(b)(4) of the JAG Manual also to be void in *United States v. Cunningham, supra,* at 144-45.

Some seven months after the institution of the present proceedings in the United States District Court, one of the defendants herein, the Judge Advocate General of the Navy, certified[7] to the United States Court of Military Appeals the question whether the *Greenwell* case was to apply retroactively. *United States v. Ferry, supra.* The accused in that case, PFC Ferry, was and is a member of the class established by the district court in this case.

Prior to the District Court's decision in this case, the Court of Military Appeals held in *Ferry* that the *Greenwell* decision applied retroactively, prohibiting the use of such void convictions as evidence in other cases.

B. The Proceedings in the District Court.

The original plaintiff, Richard E. Brown, filed a Complaint March 29, 1972, on behalf of himself and the class of all others tried and sentenced by courts-martial having the same jurisdictional defect. By order of June 27, 1972, the District Court permitted David L. Taylor to intervene as

7. Certification is an unusual procedure allowed by Article 67 of the UCMJ through which the government may appeal as of right either a favorable or an unfavorable ruling of the court below. In *Ferry* there was no reason for the government to appeal to the Court of Military Appeals—other than to obtain a judicial decision on the retroactivity issue—since the court below had ruled entirely in the government's favor.

a party plaintiff, and Taylor filed his Complaint June 30, 1972.

On November 8, 1972, the District Court confirmed the action under Rule 23 F. R. C. P. as a class action on behalf of all persons "sentenced by special courts-martial convened under authority ineffectively or improperly delegated by the Secretary of the Navy, pursuant to Article 23(a)(7), Uniform Code of Military Justice during the period May 5, 1950 to June 5, 1970".

It is undisputed that each member of the class, as it was defined in the Complaint, was tried and sentenced by a special court-martial of the Navy or Marine Corps that had been convened pursuant to a regulation or instruction of the Secretary of the Navy that (a) has been declared invalid by the United States Court of Military Appeals, *United States v. Greenwell, supra; United States v. Cunningham, supra;* or (b) has not been passed upon by the Court of Military Appeals but suffers the same jurisdictional defect as that court found in *Greenwell* and *Cunningham.* It is likewise undisputed that the plaintiffs are entitled to relief unless barred by the judgments of the courts-martial which lacked jurisdiction.

After limited discovery, both sides moved for summary judgment on the issue of defendants' liability. The District Court granted summary judgment for defendants, denied plaintiffs' motion for summary judgment, and narrowed the class action to exclude all back-pay claims under the Tucker Act and to exclude from the class all persons except those tried under § 0103(b)(5) of the JAG Manual between October 29, 1965, and May 28, 1970.

The District Court's judgment was based on its decision to limit to prospective application only the decisions of the United States Court of Military Appeals that had declared the courts-martial in question to be without juris-

diction.[8] The "major factor" in the District Court's decision was the "magnitude of the financial impact upon the public monies that a holding of retroactivity in this case would impose." 365 F. Supp. at 346 n. 9, 350 (A32 n. 9, A40). The District Court estimated that impact as being approximately $30 million. Otherwise, the District Court held in favor of plaintiffs on all issues.

The District Court recognized that "This case involves only a most narrow question of traditional jurisdiction" and that a failure of jurisdiction "in its classic form", i.e. a lack of "adjudicatory power" . . . "would necessarily be fully retroactive in effect . . ." *Gosa v. Mayden*, 413 U. S. 665, 693-94 (1973) (Marshall, J. dissenting). 365 F. Supp. at 342, 345-48, 349 (A25, A31-A36, A39). Yet the District Court feared that such a holding might cost the Government too much money, and create "a massive disturbance of the financial status quo" (A37). The District Court therefore framed the issue as whether "massive public expense may alone justify prospectivity . . . Absent the precipitation of a gross public financial crisis, is any amount of mere money enough?" 365 F. Supp. at 348-49 (A38). The District Court held that mere money was indeed enough to preclude otherwise available relief.

As the District Court candidly recognized in its opinion, its decision put the Court in the position of "play-[ing] money changer with the integrity of the concept of jurisdiction, and with the usual rule of the retrospectivity of decisions", 365 F. Supp. at 348 (A37). Even the District Court recognized its decision as "a dangerous course". *Ibid.*

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8. Both the District Court and the Court of Appeals reached this result in explicit disregard of the Court of Military Appeals' decision in *Ferry, supra*, holding its own prior cases to apply retroactively. See 365 F. Supp. at 343-44 (A27-A29), A47-A49, A79-A82.

C. The Proceedings in the Court of Appeals.

Plaintiffs appealed on October 9, 1973. On December 31, 1974, a divided panel of the Court of Appeals affirmed the order of the District Court.

Judge Hunter, writing for himself only, felt that the Third Circuit's decision in *McSparran v. Weist,* 402 F. 2d 867 (1968), *cert. denied,* 395 U. S. 903 (1969), required the court to apply even to this case of jurisdictional failure the criteria generally used in cases involving issues of criminal procedure, *e.g., Stovall v. Denno,* 388 U. S. 293 (1967). On those criteria, he felt that the jurisdictional defect in this case should be limited to prospective effect.

Judge Adams, concurring, based his vote on alternative grounds: either (1) plaintiffs' military convictions should be treated as civil rather than criminal proceedings and hence not subject to collateral attack (A64-A69), or (2) criminal judgments rendered by tribunals without jurisdiction may nevertheless be given effect where the jurisdiction defect is technical only, and the court believes that the petitioners for collateral relief were in fact guilty of the offenses charged against them (A69-A88, especially at A82-A88).

Judge Garth dissented on the ground that fundamental concepts of jurisdiction require that no effect be given to purported criminal judgments rendered by tribunals without jurisdiction. He stated:

> "A decision rendered by a military tribunal incompetent to adjudicate is a nullity . . . I find it difficult to understand how such a null and void decision can be given legally operative effect merely as a result of a fortuity in timing. Indeed, were this court to sanction such a result, jurisdiction would become a matter controlled by litigation timing rather than a concept limited by Congress." (Citations omitted.) (A92)

Plaintiffs petitioned the Court of Appeals for a rehearing *in banc* January 14, 1975. The petition was denied January 31, 1975 without opinion, Judge Gibbons dissenting.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals Has Decided Important Federal Questions in Ways in Conflict With Applicable Decisions of This Court.

The Court of Appeals' decision conflicts with applicable decisions of this Court regarding (1) the status of and effect to be given to judgments of courts-martial that proceeded without jurisdiction, (2) the proper application of the doctrine of retroactive application of judicial decisions, (3) the right of a serviceman to his statutory pay in the absence of a valid court-martial conviction, and (4) the proper scope and application of the doctrine of collateral estoppel.

A. This Court Has Always Held That No Effect May Be Given to the Judgments of Courts-Martial That Had No Jurisdiction.

The decision of the Court of Appeals undermines one of the most fundamental concepts of Anglo-American jurisprudence: that a criminal judgment rendered by a tribunal without jurisdiction is void. Not surprisingly, the decision is therefore in conflict with a line of authority in this Court going back to the early 19th Century, which until now has remained unquestioned.

In *Wise v. Withers*, 3 Cranch (7 U. S.) 331 (1806), petitioner had been convicted by a court-martial that had

no jurisdiction. Pursuant to the judgment of conviction, defendant Withers had entered petitioner's house and levied on his goods. Petitioner brought an action in trespass to recover his goods, and Withers asserted the judgment of the court-martial in defense. Chief Justice John Marshall held for a unanimous Court:

> "[I]t is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers." 3 Cranch at 337.

The decision of the Court of Appeals in this case is directly contrary to the bedrock precedent of *Wise v. Withers,* for it allows the government to keep property taken from plaintiffs and the other members of the class solely on the basis of judgments of courts-martial which admittedly lacked jurisdiction.

The Court of Appeals' decision is likewise in irreconcilable conflict with the decision of this Court in *Dynes v. Hoover,* 20 How. (61 U. S.) 65 (1857), in which the Court held:

> "Persons . . . belonging to the army and the navy are not subject to illegal or irresponsible courts-martial, when the law for convening them and directing their proceedings of organization and for trial have been disregarded. In such cases, everything which may be done is void—*not voidable, but void;* and civil courts have *never* failed upon a proper suit to give a party redress, who has been injured by a void process or void judgment." 15 L. Ed. at 844. (Emphasis added.)

That holding has never been disturbed or questioned in nearly 120 years. Indeed, in 1887 and again in 1902, the

Court reaffirmed its strict construction of the limited powers of courts-martial, holding:

> "A court martial organized under the laws of the United States is a court of special and limited jurisdiction . . . To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law. . . . There are no presumptions in its favor so far as these matters are concerned . . . Major Runkle was never legally cashiered or dismissed from the Army, and he is entitled to his longevity pay, as well as that which he has already received for his regular pay, both before the order of Secretary Belknap was revoked and afterwards." *Runkle v. United States, supra,* 30 L. Ed. at 1170, 1172 (1887).

In *McClaughry v. Deming,* 186 U. S. 49 (1902), the Court held:

> "A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction. . . .
>
> "[W]here the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment." 186 U. S. at 62, 65.

See also *United States v. Brown,* 206 U. S. 240 (1907).

By giving legally operative effect to the judgments of courts-martial not convened in accordance with the applicable statutes and regulations, the Court of Appeals'

decision in this case is contrary to all of the foregoing decisions of this Court.[9]

In the Court of Appeals Judge Hunter did not even mention the foregoing decisions of this Court; and Judge Adams attempted erroneously to distinguish them on the ground that they were direct appeals, while this case arises collaterally (A74-A75). In fact, all of the above cases arose collaterally, just as did this case. Judge Adams's amendment to his opinion following the petition for rehearing *in banc* (A102) demonstrates that the decisions of this Court are indistinguishable from this case.

The question whether effect may be given to the judgments of courts-martial that lacked jurisdiction is extremely important and is fundamental to basic notions of due process. As the District Court recognized, the result below undermines "the integrity of the concept of jurisdiction", 365 F. Supp. at 348, and opens the door to erosion of the concept that strict enforcement of jurisdictional limitations on power is essential to the proper functioning of a constitutional government.

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9. In addition, the decision of the Court of Appeals is directly contrary to the applicable military regulations, which should properly be dispositive.

The Manual For Courts-Martial (1969 Rev.) provides explicitly, at ¶ 8:

> "The jurisdiction of a court-martial—its power to try and determine a case—*and hence the validity of each of its judgments,* is conditioned upon the following requisites: *That the court was convened by an official empowered to convene it.* . . ." (Emphasis added.)

The Manual also provides, at ¶ 68(b)(1):

> "If the court lacks jurisdiction . . . the proceedings are a nullity. These objections cannot be waived and may be asserted at any time."

Neither judge of the majority below even mentioned these regulations in his opinion. The disregard of these regulations is particularly egregious here, because the regulations were promulgated by the defendants themselves.

In *Ex Parte Milligan*, 4 Wall. (71 U. S.) 2 (1866), this Court recognized the extreme importance of the precise question raised here. The Court stated:

> "The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the Military Commission mentioned in it jurisdiction, legally, to try and sentence him? . . . Had this tribunal the legal power and authority to try and punish this man? [¶] No graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law. . . . One of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress." 18 L. Ed. at 295.

B. The Court of Appeals Improperly Held That Retroactivity of a Jurisdictional Decision Must Be Measured Only by the *Stovall v. Denno* Criteria, Contrary to More Recent Holdings of This Court.

The Court of Appeals held that even though this case involved a question of "pure" jurisdiction, the failure of jurisdiction could be and indeed must be limited to prospective effect, based on the doctrine of *Linkletter v. Walker*,[10] and the "purpose-reliance-effect" test of *Stovall v. Denno, supra.*

The decision of the Court of Appeals is thus in conflict with the decisions of this Court in *Robinson v. Neil*, 409 U. S. 505 (1973), and *United States v. United States Coin & Currency*, 401 U. S. 715 (1971), which limit the *Linkletter* doctrine of prospective limitation to defects in

10. 381 U. S. 618 (1965).

criminal trials involving rules of evidence, procedure, or modes of trial. *Robinson* for example, held that where the defect in question was nonprocedural and went to the question whether there should have been a trial at all, the defect could not be limited to prospective effect, but affected all prior trials. Mr. Justice Rehnquist stated for a unanimous Court:

> "We do not believe that this case readily lends itself to the analysis established in Linkletter. Certainly, there is nothing in Linkletter or those cases following it to indicate that all rules and constitutional interpretations arising under the first eight Amendments must be subjected to the analysis there enunciated. Linkletter itself announced an exception to the general rule of retroactivity. . . . Guarantees that do not relate to these procedural rules cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis." 409 U. S. at 507-08.

This case is more like *Robinson* than like *Linkletter;* yet the Court of Appeals held, in conflict with *Robinson,* that the *Linkletter* analysis inexorably applied.

In *United States v. United States Coin & Currency,* 401 U. S. 715, 724 (1971), the Court held that where no trial should have taken place at all,

> "even the use of impeccable factfinding procedures could not legitimate a verdict decreeing forfeiture. . . . No circumstances call more for the invocation of a rule of complete retroactivity."

Likewise where, as here, the court lacked jurisdiction, the question of the reliability of its fact-finding processes should not even arise. Inquiry must stop at the threshold question whether the court had the power to engage in fact-finding processes at all.

The court below misinterpreted this Court's decision in *Gosa v. Mayden,* 413 U. S. 665 (1973), as holding that jurisdictional defects should be limited to prospective effect only, on the basis of the same criteria generally used in connection with questions of criminal procedure (A54-A55, A76-A79). *Gosa* does not mean that at all; but rather implies that full retroactivity is required in cases involving "jurisdiction in its classic form" or true "jurisdictional competency." 413 U. S. at 693, 694 (Marshall, J., dissenting).

There was no Opinion of the Court in *Gosa.* Four Justices stated unequivocally the view that a purely jurisdictional decision must invariably be accorded full retroactive effect. 413 U. S. at 692 (Rehnquist, J.); *id.* at 693 (Stewart, J.); *id.* at 693-706 (Marshall and Brennan, JJ.). A four-judge plurality made up of the Chief Justice and Justices White, Blackmun, and Powell held that *O'Callahan*[11] should be limited to prospective application, but treated *O'Callahan* as primarily involving rules of criminal procedure. The plurality opinion referred to the "jurisdictional" aspects of *O'Callahan* only within quotation marks. See 413 U. S. at 673. Mr. Justice Marshall, dissenting, observed:

> "Mr. Justice Blackmun's plurality opinion, by its efforts to establish that *O'Callahan v. Parker* . . . was not a decision dealing with jurisdiction in its classic form, implicitly acknowledges that if *O'Callahan* were in fact concerned with the adjudicatory power—that is, the jurisdictional competency—of military tribunals, its holding would necessarily be fully retroactive in effect, cf. e.g., *Linkletter v. Walker,* . . ." 413 U. S. at 693-94. (Footnote omitted.)

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11. *O'Callahan v. Parker,* 395 U. S. 258 (1969).

Mr. Justice Marshall's assessment of the plurality opinion is fair, and implies that the Court intended full retroactivity in cases such as this, directly involving "jurisdiction in its classic form."

The Court should take this opportunity to make clear that *Gosa* was not intended to abrogate fundamental concepts regarding true jurisdictional competency, and that lower courts should not apply rigid rules of prospective limitation indiscriminately, as did the Court of Appeals in this case. The guidance of this Court is necessary to keep the doctrine of prospective limitation within its proper and intended bounds.

C. The Decision Below Conflicts With This Court's Holdings That Servicemen Are Entitled to Their Statutory Pay and Allowances in the Absence of a Valid Court-Martial Conviction.

The decision of the Court of Appeals rests in large measure upon that Court's belief that the jurisdictional defect in this case was a mere technicality, and that plaintiffs and the members of the class were guilty, anyway, of the offenses of which they were charged. See A56-A57, A59, A84-A85, A88. The decision is therefore in plain conflict with the decision of this Court in *Bell v. United States*, 366 U. S. 393 (1961), which held that judicial decisions should not be influenced by inflamatory, irrelevant, and prejudicial considerations of improperly presumed and legally unestablished guilt.

In *Bell* plaintiffs were Korean war turncoats who had given aid and comfort to the enemy, but who now sued for their back pay for the time spent in North Korea. Despite plaintiffs' shocking and reprehensible conduct,[12] this Court held:

12. In contrast, special courts-martial may not impose more than six months imprisonment. See footnote 4, *supra*.

> "In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of . . . pay. But a soldier who has not received such a punishment *from a duly constituted court-martial* is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be." 366 U. S. at 402. (Emphasis added.)

Chief Justice Chase expressed a similar admonition in *Ex Parte Milligan, supra,* that considerations of presumed or even established guilt should not be allowed to lead to the erosion of fundamental concepts of jurisdictional limitations on governmental power:

> "The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record, which must here be taken as true, admit his guilt. But whatever his desert of punishment may be, it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice." 18 L. Ed. at 299. (Chase, C. J., concurring.)

The decision of the Court of Appeals is precisely contrary to the holding in *Bell,* because it deprives plaintiffs and the members of the class of their statutory pay[13] in the absence of a sentence "from a duly constituted court-martial". The decision is contrary to both the letter and the spirit of the *Milligan* decision, because it places con-

13. 37 U. S. C. § 204(a), *et seq.*

siderations of presumed but legally unestablished guilt ahead of the "integrity of the concept of jurisdiction". 365 F. Supp. 348 (A37).

D. The Decision of the Court of Appeals Conflicts With This Court's Decisions Concerning the Proper Application of the Doctrine of Collateral Estoppel.

In *United States v. Ferry, supra,* the Court of Military Appeals held its *Greenwell* decision to apply retroactivity to invalidate prior convictions by courts-martial convened under § 0103(b)(5) of the JAG Manual.

As noted above, the defendants in this case initiated the *Ferry* litigation in the Court of Military Appeals seven months after the institution of this litigation, for the purpose of obtaining a holding of non-retroactivity for use in this case. PFC Ferry concededly was and is a member of the plaintiff class in this case.

Under these circumstances the doctrine of collateral estoppel as enunciated by this Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U. S. 313 (1971), and earlier cases would normally preclude the defendants from relitigating the issue whether the *Greenwell* decision operated retroactively to invalidate the class members' prior convictions. Since the defendants had already had "one full and fair opportunity for judicial resolution of the same issue," 402 U. S. at 328, they should not have been allowed to burden the judicial system with relitigation of the issue in another court.

The Court of Appeals decision here conflicts with this Court's decision in *Blonder-Tongue,* by allowing defendants to relitigate in the District Court the exact issue litigated at their initiative in the Court of Military Appeals and resolved there against them. *Cf. Robb v. United States,* 456 F. 2d 768 (Ct. Cl. 1972).

The issue as presented in this case is particularly interesting, because it raises the question whether a plaintiff class may assert the collateral estoppel effect of a judgment obtained by an individual class member in prior litigation, as was allowed by the District Court in the *Gypsum Cases* [14] and was suggested by the Third Circuit in *Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 758-62 (3rd Cir. 1974) (*in banc*). There can be no question here that in the individual action (*Ferry*) the government was well aware of the pending class action, and prosecuted the individual action with an eye toward its effect in the class action. Indeed the government attached a copy of the *Brown* complaint to its brief to the Court of Military Appeals in *Ferry*. Under these facts, the government is properly estopped from relitigating against the other members of the class. See 7A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE, § 1789, p. 183 (1972).

The Court of Appeals' attempt to distinguish *Ferry* from this case on the ground that the military court did not decide the retroactivity issue is specious.

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14. *In Re Gypsum Cases*, Civil No. 46414-A AJZ (N. D. Cal.), Pretrial Order No. 30, November 17, 1971, Paragraph 6:

> "The motion of Plaintiffs dated June 20, 1971 for partial summary judgment as to Defendants United States Gypsum Company, National Gypsum Company and Kaiser Gypsum Company, Inc., on the grounds of collateral estoppel is granted. The partial summary judgment shall not apply to any other defendant. The motion of Defendants to bind such plaintiffs to such portion of the March 17, 1971 Findings of Fact, Conclusions of Law and Judgment dated April 19, 1971 as were adverse to the Plaintiffs is denied. The motion of Defendants to condition the granting of Plaintiffs' motion for partial summary judgment on their acceptance of such portions of the March 17, 1971 Findings of Fact, Conclusions of Law and Judgment dated April 19, 1971 as were adverse to the Plaintiffs is denied. This order will apply to all plaintiffs, whether by intervention or otherwise and to all parties who may hereafter become plaintiffs. Liaison counsel for Plaintiffs will submit a form of partial judgment in accordance with the Orders contained in this paragraph."

The Certificate of Review in *Ferry*, drafted by the defendants themselves, required the Court of Military Appeals to resolve the following:

> "Does the decision of the United States Court of Military Appeals in *United States v. Greenwell*, 19 USCMA 460, 42 CMR 62 (1970), have retroactive application, so as to render Prosecution Exhibit 3 (the record of conviction by a 1969 special court-martial convened pursuant to the *JAG Manual* provision found to be legally ineffective in *Greenwell*) inadmissible in evidence?"

The Court did resolve the certified question, as the statute [15] required it to do. As stated by Chief Judge Darden, the holding of the military court was that the *Greenwell* decision applied retroactively so as "to prohibit the use of *a conviction that it invalidates* to enhance the punishment of the accused in a subsequent trial." 22 U. S. C. M. A. at 340. (Emphasis added.) Judge Duncan simply answered the certified question in the affirmative, that the *Greenwell* case did apply retroactively. *Ibid.* Thus the precise question presented in this case was at issue and was decided in *Ferry*.

Under principles of collateral estoppel enunciated by this Court, the *Ferry* result should have controlled this case. The decision of the Court of Appeals is therefore contrary to the decisions of this Court.

II.

The Court of Appeals' Decision Is in Conflict With the Decisions of Other Courts of Appeals.

The decision of the Court of Appeals conflicts directly with the decision of the Court of Appeals for the Seventh

15. Articles 67(b)(2), 67(d) UCMJ, 10 U. S. C. §§ 867(b)(2), 867(d).

Circuit in *Brough v. United States,* 454 F. 2d 370 (7th Cir. 1971), which held that when a regulation is found to conflict with its governing statute, as in *Greenwell,* the defect may not be limited to prospective effect.

As the Seventh Circuit stated in *Brough:*

> "To apply *Toussie* prospectively only would indicate that a federal statute duly enacted by Congress could mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards. Here the relationship of §3282 to §§462 and 453 had never been considered by the Supreme Court prior to *Toussie.* Nevertheless, a statute, under our system of separate powers of government, can have only one meaning. An interpretive rule, such as 32 C. F. R. §1611.7(c), concerning that statute is either consistent with the statute or inconsistent. If inconsistent, as the Supreme Court found in *Toussie,* then the prior interpretation is, and always was, invalid. It necessarily follows that *Toussie* should have retroactive application in the case at bar." 454 F. 2d at 372.

The decision of the Court of Appeals in this case holds directly opposite to *Brough* that somehow Article 23(a)(7) and JAG Manual §0103(b)(5) were consistent prior to May 28, 1970, and inconsistent thereafter, although neither was amended or changed in any way. The Third and Seventh Circuits have thus adopted irreconcilably different views regarding proper application of the doctrine of prospective limitation, which should be resolved by this Court.

The decision of the Court of Appeals also conflicts with the decision of the Fifth Circuit in *Donivan v. Henderson,* 503 F. 2d 1401 (5th Cir. 1974), *rehearing denied,* 506 F. 2d 434 (1975), which held that this Court's decision in *Wingo v. Wedding,* — U. S. —, 41 L. Ed. 2d 879 (1974), must be

applied retroactively. The question in *Wingo* was whether a Judge or a Magistrate should conduct *habeas corpus* evidentiary hearings. Although the *Greenwell* decision likewise involved the question whether trial was conducted by an authorized tribunal, the Third Circuit decided contrary to the Fifth that retroactive application should not be granted.

The decision of the Court of Appeals also conflicts with the decision of the Court of Claims in *Robb v. United States, supra.* *Robb* was a collateral action to recover a fine levied by a court-martial without jurisdiction. On the jurisdictional issue, the Court of Claims held that controlling weight should be given to a prior decision of the Court of Military Appeals in another case. Relying upon Article 76, UCMJ, and on considerations of comity, the Court held that:

> "the Government . . . has no . . . right to ask a civilian Court to overturn a decision of the Court of Military Appeals in favor of the accused. . . .
>
> [W]e think that civilian courts should normally follow, without the usual independent examination, a Court of Military Appeals ruling on an issue of jurisdiction under military law which favors the court-martial defendant." 456 F. 2d at 772.

The court assumed that it would have been "technically bound" to the prior decision, if the parties had been the same. *Ibid.* The refusal of the Court of Appeals to accord collateral estoppel effect to, or even to follow, the *Ferry* decision in this case (where the parties are the same) is in direct conflict with the decision of the Court of Claims in *Robb.*

The decision of the Court of Appeals conflicts also with the decisions of the Second and the Tenth Circuits in *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied,*

395 U. S. 977 (1969), and *Esplin v. Hirschi*, 402 F. 2d 94 (10th Cir. 1968), *cert. denied*, 394 U. S. 928 (1969), that under Rule 23 a plaintiff may represent a class of persons injured by similar acts of defendants, even though each act and each plaintiff's injury may not be identical. The decision of the Court of Appeals to limit the class in this case to persons tried under one of several jurisdictional regulations suffering the same defect conflicts with the foregoing principle of *Green* and *Esplin*.

CONCLUSION.

For the reasons stated, this Honorable Court should grant the petition for a writ of certiorari to review the issues raised therein on the merits.

Dated: March 31, 1975

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

MAR 31 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1237

RICHARD E. BROWN and DAVID L. TAYLOR, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v

UNITED STATES OF AMERICA, SECRETARY OF DEFENSE, SECRETARY OF THE NAVY, CHIEF OF NAVAL OPERATIONS, CHIEF OF NAVAL PERSONNEL, COMMANDANT OF THE MARINE CORPS, JUDGE ADVOCATE GENERAL OF THE UNITED STATES NAVY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Civil Action No. 72-635.

RICHARD E. BROWN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

UNITED STATES OF AMERICA, SECRETARY OF DEFENSE, SECRETARY OF THE NAVY, CHIEF OF NAVAL OPERATIONS, CHIEF OF NAVAL PERSONNEL, COMMANDANT OF THE MARINE CORPS, JUDGE ADVOCATE GENERAL OF THE UNITED STATES NAVY,

Defendants.

OPINION AND ORDER.

NEWCOMER, *J.* September 28, 1973.

Plaintiff Richard E. Brown enlisted in the United States Marine Corps on July 22, 1966, for a term of four years. On February 7, 1969, plaintiff Brown was sentenced to punitive discharge, confinement, and forfeiture of pay and allowances by a special court-martial convened by the

Commanding Officer, Transient Facility, Camp Smedley D. Butler, Camp Hansen, Okinawa. This special court-martial was ostensibly convened pursuant to the authority of 10 U. S. C. § 823(a)(7) which grants special courts-martial convening authority to "the commanding officer or officer in charge of any . . . command when empowered by the Secretary concerned."

Plaintiff David L. Taylor enlisted in the Marine Corps on July 28, 1967, for a term of four years. On October 25, 1968, he too was sentenced, after trial and conviction by a court-martial also convened ostensibly pursuant to § 823(a)(7) by the Commanding Officer, Student Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California. On September 10, 1969, he was sentenced by a second similar tribunal after a trial on a different alleged offense.

On May 28, 1970, the Court of Military Appeals held in *U. S. v. Greenwell,* 19 USCMA 460, 42 CMR 62, that the procedure used by the Secretary of the Navy to empower commanders to convene special courts-martial pursuant to 10 U. S. C. § 823(a)(7) constituted an illegal delegation of power, and that the courts convened pursuant to such a delegation were without authority.

Plaintiff Brown and plaintiff Taylor have sued, on behalf of themselves and all others tried by such courts-martial, for relief in the nature of mandamus to direct the Secretary of the Navy and the other defendants to correct the pertinent records to reflect the invalidity of such convictions, that is, to expunge any clerical reflections of such a court-martial, and also to recover the back pay and monetary value of the benefits of which persons were deprived as a result of such convictions. Both sides have moved for summary judgment.

The first issue presented by this case is the propriety of such relief in the nature of mandamus. This Court has

general authority under 28 U. S. C. § 1361 to entertain an action in the nature of an action for an original writ of mandamus. It is clear that in appropriate circumstances this Court may mandamus any of the defendants in this case, including the Secretary of the Navy. *Decatur v. Palding,* 14 (U. S.) Pet. 497 (1840). Plaintiffs claim that the courts-martial which tried them were without authority of any kind, that this has in principle been determined by the Court of Military Appeals, and that the Secretary of the Navy and the other named defendants have wrongly refused to give retroactive effect to the decision of the Court of Military Appeals. The Court agrees with plaintiffs that, in general, the Navy has no right to maintain records of wholly void court-martial convictions as if they were valid, and to continue bearing clerical and bureaucratic witness to their validity if they are not. To correct such a record is a purely ministerial act, which is a proper subject for a writ of mandamus.[1] The fact that plaintiffs' right of relief and defendants' ministerial duties are disputed by defendants does not, as defendants argue, render the rights of plaintiffs "unclear" so as to necessitate dismissal of the action, or destroy this Court's jurisdiction. The time at which plaintiffs must establish to the Court the clear nature of their entitlement is at the point of final decision, not at the filing of the suit. *United States ex rel. Joy v. Resor,* 342 F. Supp. 70 (D. Vt. 1972). Plaintiffs have stated in their complaint facts sufficient to make out an arguable right to mandamus. Such a pleading vests this Court, pursuant to 28 U. S. C. 1361, with the jurisdiction to determine the facts, hear the arguments, and decide the case on the merits.

The defendants have argued that this Court is without authority to entertain a collateral attack on a court-martial

1. The scope of mandamus relative to the return of illegally levied fines and forfeitures is discussed infra.

conviction by way of mandamus. The history of the limits on collateral review of court-martial convictions is a somewhat tangled web. The military court system has traditionally been viewed as being as wholly distinct from the federal civil courts as the courts of the state are. The opinions on its exact status have ranged, in recent years, from those of Mr. Justice Vinson and Mr. Justice Minton in *Burns v. Wilson,* 346 U. S. 137 (1953), granting the military system an aura of sovereignty even superior to that of a state,[2] to those of Mr. Justice Douglas in his concurring opinion in *Parisi v. Davidson,* 405 U. S. 34, 1972, that the whole military "is simply another administrative agency, insofar as judicial review is concerned." id. at 51.

Still it must be admitted that the problems of administering justice within the military setting are special problems, and their solution has been given to Congress in the first instance by the Constitution. Congress has seen fit to create a system of military justice wholly apart from the civil system. But it has long been recognized that the Constitution does not, a priori, prevent the subjects of courts-martial from resorting to the civil courts for the vindication of certain rights. The most important avenue of resort is, of course, the writ of habeas corpus, specifically protected by the Constitution, traditionally capable of reaching issues concerning military jurisdiction, and protected from legislative encroachment as a matter of course. See *Gusik v. Schilder,* 340 U. S. 128 (1950). More will be said on the shifting scope of habeas corpus presently. But now it should be noted that habeas corpus was not the sole

2. Although the opinions in *Burns v. Wilson* reflect a very deferential attitude toward military sovereignty, some writers have traced the abandonment of the traditional "lack of jurisdiction" standards for collateral review by habeas corpus to this case. See, e.g. Hosmer, *Justice & the Military,* § 6-320.

method of collateral attack available in the early years of the Republic. In *Wise v. Withers,* 3 (U. S.) Cranch, 331 (1806), the Supreme Court held that the decision of a court-martial that a certain justice of the peace in the District of Columbia was not an officer of the United States, and was therefore a proper subject for Militia duty, was not binding in an action for trespass *di bonis asportatis* against the members of the court and the officer whom they sent to seize goods to pay a fine for failure to report which had been levied by the court-martial. The argument was made by counsel for the defendant that the decisions of a court-martial were "final and conclusive like those of an ecclesiastical court . . .", but the Supreme Court, through Marshall, C. J., held that in any action the Court may review the jurisdiction of a court-martial, and if it has acted without any jurisdiction, the Court may so decide and enter judgment accordingly. The Supreme Court found that "the court and the officer are all trespassers", id at 337. While it is true that this case involved the federal militia, and not the regular armed forces, there is no legal reason for distinguishing the cases, as the power of Congress over the federal militia was as great as over the Army. See also, *Houston v. Moore,* 5 (U. S.) Wheat 1 (1820) (Review of state militia court-martial jurisdiction through trespass); *Martin v. Mott,* 12 (U. S.) Wheat 19 (1827) (Review of federal court-martial jurisdiction over state militia man called to federal service, through replevin).

The above cases dealt with challenges to the jurisdiction of courts-martial over persons who alleged that they were not really in service when tried at all. In *Dynes v. Hoover,* 20 (U. S.) How. 65 (1857), the Supreme Court reviewed an assault and battery-false imprisonment action by a Navy seaman against his jailors. He had been sentenced to imprisonment by a court-martial, and though the

Court affirmed the actions of the court-martial in Dynes' particular case, it held that such an action would lie if the court-martial had been without either subject matter or personal jurisdiction as had been alleged, even though Dynes was clearly in service at the time. It is interesting to note that Dynes' sentence had apparently been served prior to the bringing of the action, so that habeas corpus would not have been available, but this was not seen by the Court as any impediment to collateral attack on the court-martial conviction.

In *ex parte Reed,* 100 U. S. 13 (1879), the Supreme Court affirmed, surprisingly for the first time, the availability of habeas corpus to a serviceman imprisoned by a court-martial lacking subject matter or personal jurisdiction, although such jurisdiction was found to be present in Reed's particular case. Just three years later, in *ex parte Mason,* 105 U. S. 696 (1882), some members of the Court doubted the power of the federal courts to issue habeas corpus in such a situation, though all agreed that it could only be issued on the basis of a lack of jurisdiction in the court-martial in question, which jurisdiction was found to exist in Mason's particular case as well.

Keyes v. U. S., 109 U. S. 336 (1883), is the next important case, dealing as it does with the first review by the Supreme Court of what has become a fairly common method of collateral attack on the validity of a court-martial, the suit for back pay. There the Court recognized the validity of such a suit "[w]here there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, [or] there is no tribunal authorized by law to render the judgment." id. at 339. All these are ancient antecedents of the traditional concept of jurisdiction.

In *Wales v. Whitney,* 114 U. S. 564 (1884), the Court's previous doubts as to the availability of habeas corpus seem

to have vanished. In holding that actual custody was necessary for the issuance of habeas corpus, the court said

> "In thus deciding, we are not leaving the appellant without remedy if his counsel are right in believing the court-martial has no jurisdiction of the offense of which he is charged. He can make that objection to the court before trial. He can make it before judgment after the facts are all before the court. He can make it before the reviewing tribunal."
>
> "If that court finds him guilty, and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped in whole or in part, he can do the same thing. In all these modes he can have relief if the court is without jurisdiction . . ." Id. at 575.

Smith v. Whitney, 116 U. S. 167 (1885) involved the issue of whether a federal court could issue a writ of prohibition to forbid trial by a court-martial which lacked jurisdiction. The court specifically reserved judgment on the propriety of such a writ, finding that the court-martial in question had jurisdiction.

The availability of habeas corpus was again affirmed in principle in *U. S. v. Grimley,* 137 U. S. 147 (1890), *Johnson v. Sayre,* 158 U. S. 109 (1895), and *Carter v. McClaughry,* 183 U. S. 365 (1902), and the propriety of a suit for back pay was affirmed in principle in *Swaim v. U. S.,* 165 U. S. 554 (1897). But *McClaughry v. Deming,* 186 U. S. 49 (1902) was in many ways the landmark in this line of cases, for it was in this case that the Supreme Court found a lack of court-martial jurisdiction for the

first time, reversing the Eighth Circuit and ordering habeas corpus. Here is the affirmance that what the court had held in principle it would apply in fact in the appropriate case.

The question of the propriety of mandamus as a remedy against an improper court-martial proceeding does not appear to have ever arisen in the Supreme Court. This is not surprising, since prior to the passage of 28 U. S. C. § 1361 by Congress in 1962, it was held that the federal courts were without authority to entertain actions for mandamus as an original writ. See *McIntire v. Wood,* 7 (U. S.) Cranch 504 (1813), and *Marshall v. Crotty,* 185 F. 2d 622 (First Circuit, 1950). The exception to this rule involving the courts of the District of Columbia, see *Kendall v. U. S.,* 12 (U. S.) Pet. 524 (1838), does not appear to have been either widely known or widely utilized. However, it is interesting to note that in the two related cases of *U. S. ex rel. Creary v. Weeks,* 259 U. S. 366 (1922) and *U. S. ex rel. French v. Weeks,* 259 U. S. 326 (1922), which dealt with actions by the Army Classification Board, the Supreme Court cited the court-martial line of cases, habeas corpus, trespass, et al., for the proposition that mandamus could lie only to test the jurisdiction of a military tribunal (and by necessary inference, would lie then). It is true that mandamus has never been directly approved as an avenue of collateral attack upon the validity of a court-martial conviction. Yet a review of the early cases impels the conclusion that, from the beginnings of our legal system, the absolute lack of the traditional accoutrements of jurisdiction could be litigated by whatever means was most handy; trespass d.b.a., replevin, assault and battery, false imprisonment, habeas corpus, prohibition, suit for back pay. Never has the Supreme Court said that any means of raising the issue was improper; rather

it has always decided the issue. The same course was adopted as late as *U. S. v. Augenblick*, 393 U. S. 348 (1969), in the context of a suit for back pay. It is true that habeas corpus has become the primary way to test the legal sufficiency of court-martial proceedings. It has, in the course of time, expanded beyond what Lord Mansfield would have recognized as questions of jurisdiction. See generally the discussion of the scope of habeas corpus in the context of court-martial judgments in *Levy v. Parker and Resor*, — F. 2d — (3rd Cir., 1973). And the suit for back pay has filled most needs when the custody requirements of habeas corpus were not met. Yet this Court believes that, at least in a case concerned with traditional concepts of jurisdiction, mandamus will lie to test the jurisdiction of a court-martial. Doubtless a District Court should pursue such a course only in the most exceptional circumstances, but for certain reasons of procedure and judicial economy, this case appears to present such circumstances.

The writ of mandamus has come into recent use to compel military boards for the correction of records established under 10 U. S. C. § 1552, to correct records of invalid court-martial proceedings after the refusal of such a board to do so. *Ashe v. McNamara*, 355 F. 2d 277 (1st Cir., 1965); *Smith v. McNamara*, 395 F. 2d 896 (9th Cir., 1968); *Haines v. U. S.*, 453 F. 2d 261 (3rd Cir., 1970); *Lima v. Secretary of the Army*, 314 F. Supp. 377 (E. D. Pa., 1970); and *Angle v. Laird*, 429 F. 2d 892 (10th Cir., 1970). See also *Ragoni v. U. S.*, 424 F. 2d 261 (3rd Cir., 1970). The progenitor of this approach is the *Ashe* case. The opinion in Ashe is quite narrowly written. It is sometimes read as reflecting a general suspicion that review of proceedings by Boards of Records—Correction is a narrow exception to 10 U. S. C. § 876, which provides that court-martial sentences are "final

and conclusive" and binding on, inter alia, all courts of the United States. This was the analysis of the court in *Parrish v. Seamans*, 343 F. Supp. 1087 (D. S. C., 1972).[3] The essence of this argument is that 10 U. S. C. § 1553 is an exception to § 876, and that the right of judicial review of § 1553 proceedings found in the legislative history of that section is the only exception to § 876 other than habeas corpus. This Court can agree with the first part of this proposition but does not agree with the last.

This Court sees no impediment to the use of mandamus directly, and not merely on the board for the correction of records, arising out of 10 U. S. C. § 876. The provisions of § 876 embodied a concept of legal finality, and must be read to encompass the normal collateral exceptions to such finality. One of those exceptions is and has always been that complete lack of jurisdiction in the narrow sense may be raised in any available proceeding. The Supreme Court has held that this language in § 876 was not intended to preclude habeas corpus. *Gusik v. Schilder*, 340 U. S. 122 (1951). It is true that habeas corpus is a constitutionally protected remedy. However, the Supreme Court has had the opportunity to hold that a suit for back pay attacking a court-martial conviction was prohibited by § 876 and has chosen not to do so. *Augenblick*, supra. The suit for back pay attack has always been regarded as unaffected by § 876 in the Court of Claims, the forum which, until the 1964 amendment to the Tucker Act, 28 U. S. C. § 1346, had exclusive jurisdiction over such suits, and the forum in which the issue has generally been raised since then. See the Court of Claims opinion in *Augenblick*, 377 F. 2d 586 (1967) and the cases cited therein. It is the opinion of this Court

3. This Court does not reach the same conclusion as the Court in *Parrish*, but has found the discussion there very helpful nonetheless.

that these cases are correct, and further that if the constitutionally unprotected suit for back pay is not rendered unavailable by §876, neither is jurisdiction to entertain direct mandamus in an appropriate case.

The argument against reading §876 as a bar to either direct mandamus or a suit for back pay was stated succinctly by the Court of Claims in *Augenblick* as follows:

> "There is no adequate reason for looking to habeas corpus alone, or for thinking that congress limited its exception from 'finality' to that specific proceeding. Liberty is of course important, but so are a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation. To deny collateral attack to one not in confinement—the consequence of saying that habeas corpus is the only remedy—would be to deny the possibility of review by a constitutional court and ultimately by the Supreme Court, of the constitutional claims of servicemen like plaintiff who have not been sentenced to jail or who have been released. [377 F. 2d 586, 592 (1967)]."

This language was relied upon by the D. C. Circuit in *Kaufman v. Secretary of the Air Force,* 415 F. 2d 991 (1969) to support its conclusion that habeas corpus is not the exclusive exception to §876. Both the *Kaufman* case and the earlier case to the same effect of *Gallagher v. Quinn,* 363 F. 2d 301 (D. C. Circuit 1966) involved "declaratory judgment" and "mandatory injunction" requests whose jurisdictional basis can only have been 28 U. S. C. §1361.

The Third Circuit has recognized without disapproval in *Ragoni,* supra, that "Several courts have held that Article 76 (§876) was not intended to bar *any* collateral attack on court-martial decisions.", citing *Kaufman,* supra, and the Court of Claims opinion in *Augenblick,* supra.

Further, *Kaufman* was cited by the Third Circuit with general approval in *Levy v. Parker and Resor,* supra. It is interesting to note that in *Smith v. McNamara,* supra, the 10th Circuit, in the context of a case involving mandamus to a board for the correction of records, did not in its opinion follow the narrow language of *Ashe,* but the broad ideas of *Augenblick* and *Kaufman.*

The *Ashe* decision may be read as holding no more than that jurisdiction exists to mandamus the board for the correction of records, but not that jurisdiction does not exist to mandamus the Secretary or other official directly in an appropriate case. This Court finds nothing in *Haines* or *Ragoni* to indicate that the Third Circuit has specifically adopted the view that mandamus to the board for the correction of records is the only action for which this Court has jurisdiction under § 1361. The existence of the Board may raise questions under the *exhaustion* doctrine, but that is a separate issue. To hold that mandamus to the Board is the only action over which this Court has jurisdiction, exhaustion aside, would unnecessarily tie the hands of the Federal Courts and is not a construction of the statute which should be adopted absent the clearest expression of congressional purpose. Such mandamus is only a thinly veiled use of the mandamus power to examine court-martial proceedings in any event. As will be discussed more fully below, in some cases it forces those Boards to make preliminary decisions on legal issues outside their competence, and makes the outcome of the litigation dependent to some extent on the skill of the parties creating a record on a legal issue before a tribunal with no expertise on that issue.

We need not go so far as the courts have gone in *Kaufman* and *Gallagher* in this case, and hold that all "constitutional" issues may be raised by direct mandamus. We deal here only with jurisdiction in the narrow tradi-

tional sense. Such a case does not raise the problem of relitigation of factual issues that seem to bother the Third Circuit in *Ragoni.* At any rate, such review of jurisdiction has traditionally been available in whatever proceeding was most convenient, as we have seen, and if Congress had wished to eliminate this by 10 U. S. C. § 876, and thereby put a punitively discharged or unincarcerated person convicted by an illegally convened authority on such a radically different footing than a person "in custody", the Court feels it would have said so more clearly and directly. This Court has jurisdiction over this case under 28 U. S. C. § 1361.

The defendants have also challenged this court's jurisdiction to entertain the claim of the named plaintiffs for back pay under the Tucker Act, 28 U. S. C. § 1346. The 1964 amendment to the Tucker Act, gave this Court concurrent jurisdiction with the Court of Claims on this type of action in any civil action in which less than $10,000 was at issue. As we have seen, all of the relevant precedents in the Court of Claims favor the Court's jurisdiction in this circumstance under the Tucker Act. The possibility of such an action was recognized by the Supreme Court without adverse comment in *Augenblick,* supra, at 351. The above discussion makes clear that the Court is confident that its jurisdiction under the Tucker Act is not affected by 10 U. S. C. § 876. There is no doubt that, since the named plaintiffs make no claim for a sum greater than $10,000, this Court has jurisdiction over their cases. *Perry v. U. S.,* 308 F. Supp. 245 (D. Colorado, 1970), aff'd. 442 F. 2d 353 (10th Cir., 1971). Defendants have argued that the class nature of the complaint in this action makes it a suit for a sum in excess of $10,000. This is not a challenge to the Court's jurisdiction to hear the claims of the named plaintiffs, but to the Court's jurisdiction to

hear a class action pursuant to the power conferred by § 1346. The defendants' position appears to be incorrect. See footnote 5 infra. The Court need not decide this issue, however, as the Court does not intend to accord class action treatment to the Tucker Act claims. This case requires class action treatment, binding on all members of the class without the chance to opt out of the class, to lay it to rest once and for all. It is probable that the class contains persons whose claims are, at least arguably under the precedents of the Court of Claims, in excess of $10,000. Under the Tucker Act this Court has no jurisdiction to hear their cases. They might come before the Court if they would waive any excess, but the Court cannot, consistent with due process of law, make waiver by fiat, and attempting to get such waiver would require notification of the class which would at best slow this case down for a long time. Even if the class action were to proceed under FRCP 23(b)(1) or (b)(2), there is no jurisdiction to adjudicate and bind those who make claims in excess of $10,000 under the Tucker Act. The case would not be decided with the finality it demands. However, there are no such jurisdictional problems with the mandamus action. This can be adjudicated fully under Rule 23(b)(2), as discussed more fully infra, and the entire class bound whatever the ultimate result. This is why the Court has gone to such pains to vindicate its mandamus jurisdiction in this most appropriate case.

This is probably the best point to raise the problems posed by the case of *Carter v. Seamans*, 411 F. 2d 767 (5th Cir. 1969).[4] *Carter v. Seamans* dealt with an action by a discharged Air Force Captain seeking to mandamus the Secretary of the Air Force to correct records pursuant

4. See also *Parrish v. Seamans*, 343 F. Supp. 1087, (D. S. C., 1972), a case best explained as following *Carter*.

to 10 U. S. C. § 1552. Plaintiff sought to be reinstated in the Air Force, promoted to the rank of Full Colonel, and have all his back pay and allowances paid from the date of his allegedly illegal discharge. The claim if paid in full would have approximated $135,000. The Court concluded in that case that the suit was most accurately characterized as a suit for back pay in the guise of a mandamus action. The Court correctly saw that to allow Carter's litigation as framed would virtually eliminate the $10,000 limitation on the jurisdiction of the District Courts under 28 U. S. C. § 1346. The Court dismissed the action and sent Mr. Carter to the Court of Claims, holding that "in cases of the type now under consideration, the monetary limitation imposed on its jurisdiction by § 1346 must also be held to apply to a mandamus proceeding brought pursuant to § 1361." id. at 775.

This holding is, properly understood, an excellent one, but the case at bar is not a case of the type then under consideration. First, as the *Carter* court noted, Carter was seeking various disputed and unliquidated sums in damages in his action. Although mandamus relief can reach money wrongfully held, the sum generally must be a sum certain or easily capable of reduction to a sum certain. Where, as in *Carter*, litigation is potentially as much over how much is to be paid as whether there is a duty to pay, it is the kind of case which should be handled as a contract-analogy case, not a mandamus action. Second, Carter, like most such plaintiffs, was suing for himself on the basis of facts unique to himself. There was no class consideration necessary, so that the absence of class procedures in the Court of Claims was of no import.

In the case at bar, even if we were to hold that unliquidated sums could be returned by mandamus, the cases of the named plaintiffs would not present any § 1346 prob-

lem, as in *Carter,* because, as noted, they have waived any claims in excess of $10,000. Further, the case at bar requires class treatment not available by the procedures of the Court of Claims.

This Court does not believe that it would be proper to mandamus the payment of unliquidated or disputed sums in the nature of damages. However, this Court does believe that it can mandamus the return of fines or forfeitures levied directly within the four corners of an invalid judgment by a court-martial without jurisdiction. There is no discretion to retain the latter and no reasonable basis to dispute their amount. They are sums certain or readily capable of being made certain. The cases distinguished properly in *Carter* support this position here. *Miguel v. McCarl,* 291 U. S. 442 (1934); Clackamas County, *Oregon v. McKay,* 219 F. 2d 479 (D. C. Cir., 1954). The $10,000 limitation of § 1346 is not applicable to such sums, and would pose no problem to class treatment of the mandamus action even if it were not virtually certain that no direct fines or forfeitures totalled $10,000 for any one member of the class.[5]

There is a distinct difference between returning a fine and litigating all the arguable elements of damage in a back pay case. It is true that the outcome of the mandamus class action may establish liability by *res judicata* in future

5. Since the joinder of all the class members, absent the class action device, is not essential to the determination of the claims of the named plaintiffs in this action, the claims of the class are not joint or common. This is the test of a true class suit given by Professor Moore at ¶ 23.08(1) of Moore's Federal Practice (2d ed.) Under *Snyder v. Harris,* 394 U. S. 332 (1969), the claims of individual class members in such a situation may not be aggregated for purposes of determining the amount in controversy. This applies to actions under the Tucker Act as well. *U. S. v. Louisville and Nashville Railroad Co.,* 221 F. 2d 698 (6th Cir. 1955); *Northern Natural Gas Co. v. Grounds,* 292 F. Supp. 619 (D. Kansas, 1968), reversed on other grounds 441 F. 2d 704 (10th Cir., 1971).

back pay cases in the District Courts or in the Court of Claims. That result is merely the outcome of the common factual basis of the distinct claims. The scope of the action is not necessarily coterminus in all contexts. When it is in a given case, this does not defeat the jurisdiction of this Court to decide a case properly before it. Besides, the limitation which Congress has placed upon this Court in § 1346 does not really go so much to who should determine liability as who should have the power to determine the proper elements and magnitude of the award. Any members of the class who might seek to claim more than $10,000 in damages aside from the return of fines or forfeitures will still have to seek their money in the Court of Claims. Nothing in § 1346 or *Carter v. Seamans* does, or should be read to, limit the availability of class treatment in a case such as this.

The next question concerns the applicability of the doctrines of exhaustion of remedies and abstention on comity grounds to the case at bar. These doctrines are not properly viewed as jurisdictional in nature except when required by statute. Rather, they are doctrines of judicial self-discipline. This is not to say that they are questions on which a trial court has absolute discretion, or even that the decision of a trial court must be "clearly erroneous" before an appellate court will substitute its judgment for that of the trial court. Doctrines of judicial self-discipline occupy a special position in the legal system, and the supervisory authority of appellate courts gives them special latitude in such matters. These doctrines are not doctrines of substantive law nor fixed doctrines of jurisdiction or procedure. They do not concern themselves with the rights of the parties so much as the relationship of the courts with other governmental bodies which have spheres of responsibility which must not be disregarded as a matter of course.

They are flexible, and dependent on the particular facts of the case. Their general rules have numerous exceptions, and exact precedents are rare. Yet the doctrines are very important to keeping the role of the courts in proper symbiotic balance with the other agencies of legal decision in society. Therefore, when an issue of exhaustion or abstention is raised, it must be examined with special care.

The differences between the exhaustion doctrines and the abstention doctrines have not always been recognized. See *Parisi v. Davidson,* 405 U. S. 34, especially footnote 6. When a Court chooses not to exercise jurisdiction in favor of another tribunal which can make a binding judgment on an issue not subject to any sort of review by the first court, it abstains. Thus, in a typical situation where a U. S. District Court faces a Constitutional issue based upon the construction of a state statute which could be construed to avoid the issue, the Court may abstain in favor of a state court, awaiting a binding construction of the statute. However, when a court chooses not to exercise jurisdiction in favor of another tribunal, knowing that the decision of that tribunal may later be reviewed in one way or another in an appropriate proceeding between the same parties in the first court, the court is requiring exhaustion of other available remedies.[6]

The first alternative remedy pressed by the defendants as available presents an interesting exercise in classification. Defendants say that plaintiffs may apply for writs of *coram nobis* in the Court of Military Appeals. If they did, and if they lost, would that decision be binding on this

6. Since this case concerns jurisdiction in the technical sense, the defendants have made no claim that that branch of the doctrine of exhaustion which works a waiver of an issue for failure to pursue a remedy available in the past is at all applicable in this case. But see Mr. Justice Douglas' separate opinion in *Gosa v. Mayden,* — U. S. —, 37 L. E. 2d 873 at 891 (1973).

Court in proceedings such as these as *res judicata?* The answer appears to be no. The issue in this case is the availability of collateral relief from an erroneous exercise of jurisdiction within the military justice system. This opinion has spoken at length of the propriety of such relief by the civil courts. For the Court of Military Appeals to affirm the existence of jurisdiction does no more than add one more decision by the military justice system in its own favor. *Coram nobis* proceedings are not binding in proper collateral procedures any more than the original decision is binding. Thus denial of *coram nobis* in a state court does not foreclose federal habeas corpus. The decision of the Court of Military Appeals would probably be correct and it would be entitled to great respect and consideration, but it would not constitute *res judicata* if any collateral review of court-martial jurisdiction is ever proper. The other two alternative remedies pressed, review by the Judge Advocate General under 10 U. S. C. § 869, and resort to the Board for the Correction of Naval Records, previously discussed, are clearly administrative and reviewable here, so that we deal exclusively with the question of whether to require exhaustion of other available remedies. This Court does not believe that requiring resort to any of the proposed remedies is required by the policies of the exhaustion doctrine or is in the best interests of justice in this case.

As to the named plaintiffs in this case, they still have a viable cause of action for back pay pending in front of this Court, and application for a writ of *coram nobis* from the Court of Military Appeals could not give full relief, since that Court cannot grant the kind of relief that can be granted in a back pay suit through a writ of *coram nobis. U. S. v. Snyder,* 18 USCMA 480 (1969). This fact alone disposes of *coram nobis* as a potential alternative remedy to be exhausted.

It should be noted, however, that the availability of *coram nobis* in the Court of Military Appeals is by no means clear, either to the named plaintiffs or to any members of the class. A comparison of the decisions in *U. S. v. Bevilacqua,* 18 USCMA 10 (1968); *U. S. v. Snyder,* supra, and *Osborne v. Bowman,* 20 USCMA 385 (1971), make the availability of *coram nobis* in the Court of Military Appeals in the context of this case at best speculative. In the *Osborne* case, that Court held that its writ jurisdiction extended only to the prevention of events which would "tend . . . to defeat this Court's possible future [appellate] jurisdiction" or to "prevent the rendition of any relief shown to be necessary during the ordinary course of appellate review." 20 USCMA at 387. It is questionable that a writ of *coram nobis* to inquire into the jurisdiction of a court-martial long since beyond appeal to the Court would qualify within the Court's narrow definition of its writ power as tending to preserve the Court's future appellate jurisdiction. Plaintiffs cannot properly be required to exhaust a remedy which may not exist. *Parisi v. Davidson,* supra, quoting *Noyd v. Bond,* 395 U. S. at 698, note 11.

Further, this case no longer concerns any issues in which the special expertise of the Court of Military Appeals would be of value. It has spoken on the issues of jurisdictional defects. The issue of retroactivity, insofar as it has not spoken on that issue in the recent case of *U. S. v. Ferry,* 22 USCMA 339, 46 CMR 339 (1973), requires no special expertise, difficult though the question may be. The Supreme Court has always been sensitive to the friction which might arise between the civilian courts and the military courts if the civilian courts prejudged issues within the special sphere of competence of the military courts before the military courts had had an opportunity to speak upon those issues. But where the issues involved in the

case were not within such a special sphere, the court has been much less ready to find that comity between the two court systems requires exhaustion through the military courts first. Compare *Noyd v. Bond,* 395 U. S. 683 with *Toff v. Quarles,* 350 U. S. 11 (1955) and the other cases cited in footnote 8 of *Noyd v. Bond* at page 696. This case in its present posture falls into the latter category. Further, insofar as the proper consideration in deciding whether to require exhaustion of military court remedies is the prevention of friction between the military court system and the civilian court system, there appears little likelihood of friction between the Court of Military Appeals and the civilian courts over our failure to send it the pretty package of a potential 30,000 or so applications for *coram nobis.*[7]

The second "alternative remedy" proffered by the defendants is a resort to the Judge Advocate General pursuant to 10 U. S. C. § 869. The attorneys for the defendants have admitted in their brief, quite candidly, that such resort is not available to the named plaintiffs by the very terms of the statute, since they received punitive discharges approved through the supervisory authority level of review and their cases were therefore necessarily reviewed by the United States Navy Court of Military Review pursuant to 10 U. S. C. § 866. So much for the availability of that proffered remedy. It should also be pointed out that review under Article 69 could not give named plaintiffs full relief on their back pay claims, and is futile in the face of the Judge Advocate General's published position that the decisions in *Greenwell* and *Ortiz* are not retroactive.

The Board for correction of Naval Records was established pursuant to 10 U. S. C. § 1552, providing for the

7. This is the parties ballpark estimate of the size of the class on the present case. The size of the class may have been constricted somewhat by the Court's action in redefining the class infra.

creation of civilian boards from the executive part of a military department to correct military records to remove error or injustice. The main reason why Congress created this Board had nothing to do with reviewing the actions of courts-martial. Military records are mostly the product of administrative action. A person's records may be inaccurate from clerical error or from error in the administration of all sorts of non-criminal regulations. The effect on the victim of such an error can be both great and unjust. It may effect, inter alia, pay, assignment, promotion or rating for one in the military, and, inter alia, employability, veterans benefits and pension qualifications for one already discharged. Prior to the passage of § 1552, there was no efficient mechanism to correct such errors, and after World War II, Congress itself was flooded with private bills to work such corrections. In response to this situation, Congress passed § 1552, *Ashe v. McNamara,* supra.

While the main purpose of § 1552 boards was to correct administrative errors, the Congressional grant of power was broad enough arguably to allow the boards to correct, "errors in records" resulting from improper court-martial action. This would read § 1552 as an exception to § 876 finality. This, of course, is one of the holdings of *Ashe v. McNamara.* Even since the *Ashe* decision, the Secretary of the Navy and the Navy Board have not adopted the position that § 1552 contains a complete exception to § 876. The position of the Secretary and the Board are not without merit. The kind of expertise developed by the Board in its run-of-the-mill case is of no help in deciding the legal issues raised by an attack on the validity of a court-martial. Lack of jurisdiction and Constitutional error are technical legal issues. The Board is not a Court and is not necessarily made up of lawyers. If the *Ashe* decision was based merely on a reading of the statute and a conviction that Congress

intended the Board to correct any error resulting in injustice, so be it. There are occasionally court-martial errors so glaring and clear that even a board of laymen will perceive them, and perhaps Congress did intend for the Board to then correct such an error. The *Ashe* decision, as has been noted, may also have reflected a suspicion by the Court that reading § 1552 as an exception to § 876 was necessary to the jurisdiction of the Court, a position consistent with the First Circuit's later ruling in *Davies v. Clifford*, 393 F. 2d 496 (1968), but this position has already been dealt with at length above, and this Court has reached the opposite conclusion.

The question now before the Court is whether resort to the Board should be required under the exhaustion doctrine in this case. The Board has the authority to recommend to the Secretary relief which is much closer to full relief than that which could be given by the other agencies previously discussed. However, the relief is nowhere near full relief. As noted in the recent book *Justice and the Military* by Homer E. Moyer at § 6-225, the balance which has been struck by the boards for the correction of records between § 1552 and § 876 is such that ". . . military correction boards will review sentences imposed by courts-martial, but no longer will the boards pass judgment on the conviction itself." A completely successful petitioner, Moyer notes "may have all the punitive consequences of a court-martial removed from his record, but the correction board will refuse, on jurisdictional grounds, to expunge the underlying conviction itself." This limitation on relief available—in addition to other reasons discussed later in this section—effectively eliminates military correction boards as an essential step in exhausting military remedies prior to collateral attacks on court-martial convictions in federal court."

Further, even in the area of its greatest responsibility and expertise, revealing administrative decisions, resort to the board is not always required before coming to court. Compare *McCurdy v. Zuckert,* 359 F. 2d 491 (5th Cir., 1966) with *Ogden v. Zuckert,* 298 F. 2d 312 (D. C. Cir., 1961). More importantly, the Supreme Court has recognized that in many cases to require application to the board is not appropriate and not required by the exhaustion concept. See the order vacating the Ninth Circuit's decision requiring such exhaustion in *Craycroft v. Ferrall,* 397 U. S. 335, (1970) and the explanation of that action in *Parisi v. Davidson,* 405 U. S. 34 at 38 footnote 3. There appears even less reason to require exhaustion when the pertinent issue is a very technical legal issue quite outside of the special competence of the Board. The Court is aware that the D. C. Circuit in *Owings v. Secretary of the Air Force,* required application to the Board under the exhaustion principles without opinion. See 447 F. 2d 1245, 1249, footnote 8. But the Court is also well aware of the admonition of *McKart v. U. S.,* 395 U. S. 185 (1969) that the exhaustion doctrine "is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and the particular administrative scheme involved." id at 193. Whatever the merits of requiring resort to the Board may be in a case involving collateral attack upon a court-martial not based on jurisdictional grounds, and having relevant elements arguably falling within the special expertise of the board, the Court feels that such resort is not required in the context of this case.

The Court is aware that it could have based its decision not to require exhaustion of presently available remedies on the proposition that such exhaustion is never required

when the basis for the collateral attack on a court-martial is "jurisdiction." See for example, *Autry v. Wiley*, 440 F. 2d 799 (1st Cir., 1971); *Gorko v. Commanding Officer*, 314 F. 2d 858 (10th Cir., 1963); and the many cases collected in Moyer, *Justice and the Military*, §§ 6-250 to 6-255. However, convinced as this Court may be that this case involves only a most narrow question of traditional jurisdiction, the scope of the term "jurisdiction" used in the cases, and the weakness underlying the policy that exhaustion is not required in cases attacking "jurisdiction" in some of its aspects, has justified the demonstration that exhaustion of remedies should not be required in any event.

One further policy factor militates against requiring exhaustion in this case, even if such exhaustion might arguably be otherwise required. None of the alternative remedies pressed by the defendants contains any mechanism for the class handling of the dispute, and some form of class treatment is without doubt both the most convenient and the most just way to dispose of the issues raised in this case.

We turn now to the substantive consideration of the case at bar. 10 U. S. C. § 823 reads:

> (a) Special courts-martial may be convened by—
>
> (1) any person who may convene a general court-martial;
>
> (2) the commanding officer of a district, garrison, fort, camp, station, Air Force base, auxiliary air field, or other place where members of the Army or the Air Force are on duty;
>
> (3) the commanding officer of a brigade, regiment, detached battalion, or corresponding unit of the Army;

(4) the commanding officer of a wing, group, or separate squadron of the Air Force;

(5) the commanding officer of any naval or Coast Guard vessel, shipyard, base, or station; the commanding officer of any Marine brigade, regiment, detached battalion, or corresponding unit; the commanding officer of any Marine barracks, wing, group, separate squadron, station, base, auxiliary air field, or other place where members of the Marine Corps are on duty;

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

(b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him. Aug. 10, 1956, c. 1041, 70A Stat. 44.

In 1963, the Court of Military Appeals decided *U. S. v. Ortiz,* 15 USCMA 505, 36 CMR 3. In that case it held that 10 U. S. C. § 823(a)(6) was not a direct grant of power to convene special courts-martial to any separate or detached military unit of less than roughly battalion size. In 1970, the Court of Military Appeals decided *U. S. v. Greenwell,* 19 USCMA 460, 42 CMR 62. In that case, the Court of Military Appeals decided that 10 U. S. C. § 823(a)(7) did not authorize the Secretary of the Navy to make a cate-

gorical or bloc grant of power to convene special courts-martial, and delegate the power to determine which commands qualified for category membership to flag or field officers. The Court of Military Appeals held that to "empower" a Commander, the Secretary must act personally re that Commander under § 823(a)(7). In 1973, the Court of Military Appeals decided *U. S. v. Ferry*, 22 USCMA 339, 46 CMR 339, holding that the jurisdictional nature of the *Greenwell* decision mandated its retroactivity, at least as far as the power of that Court to forbid current use of past convictions within the military justice system might go.

Plaintiffs argue that this Court is well-nigh bound to follow those decisions, and to enter judgment for plaintiffs almost in vindication of the authority of the Court of Military Appeals. Defendants argue that this Court is not so bound.

If the decision in the above cases had gone against plaintiffs, they would argue, and quite rightly, that this is a proper collateral proceeding and that the Court is not bound. One should not invoke merely a hollow doctrine of mutuality to decide that the Court is not bound in this circumstance either however.

It is true that this Court owes a duty of obedience to the highest court of a state on issues of state law. The argument is made that the Court of Military Appeals is the State Supreme Court of Military Law, and must be followed. There is a certain appeal to the argument, but the Court of Military Appeals is not a State Supreme Court in one important way—it cannot give civil effect to its own judgments, for it does not have jurisdiction over any civil court. It has absolute supervisory and decisional authority over the military criminal courts, but when litigants seek to give its decisions civil effect they must resort to the federal civil court. What then should be the posture of such

a court? Only one reported decision has considered the problem. In *Robb v. U. S.*, 456 F. 2d § 768 (1972), the Court of Claims wrote:

> "A further compelling reason for following *Averette* is that Congress seems to have endowed the rulings of the Court of Military Appeals with absolute finality where they favor the serviceman (or other court-martial defendant). Article 76 of the Uniform Code of Military Justice, 10 U. S. C. § 876 (1970), provides that military review of court-martial convictions (including decisions of the Court of Military Appeals) shall be 'final and conclusive' and 'binding upon all . . . courts . . . of the United States.' If the accused has been convicted, there is an implied exception in his behalf for relief through habeas corpus (*U. S. v. Augenblick*, 393 U. S. 348, 349-350 (1969) and, in the view of some Courts of Appeals (footnote omitted) and of this Court (footnote omitted), also by way of declaratory judgment or other form of civil action, provided that the judicial review is confined in scope to that comparable to habeas corpus scrutiny. But there appears to be no such review available to the government if the Court of Military Appeals decides against the government and in favor of the court-martial defendant. Article 76 makes a final military determination 'binding on all departments . . . agencies and officers of the United States,' and the implied exceptions are for the benefit of the accused individual so that he can seek a ruling by an Article 3 Court on his Constitutional or jurisdictional claims. The government, it would seem, has no such right to ask a civilian court to overturn a determination by the Court of Military Appeals in favor of the accused. There was no way, for example, in which the government could have Averette's conviction rein-

stated by an Article 3 Court after it had been quashed by the Court of Military Appeals. Congress can, of course, restrict the government to a decision by the Military tribunals, and Article 76 appears to have done just that. We do not suggest that we are technically bound by the *Averette* ruling, as we might be if Averette were himself the plaintiff here, but we do find significance in Congress' special deference toward the Court of Military Appeals where that Court rules against the government. This being so, we think that civilian courts should normally follow, without the usual independent examination, a Court of Military Appeals ruling on an issue of jurisdiction under Military Law which favors the court-martial defendant." id. at 772.

This discussion seems well reasoned and wise. It should be noted that the court did not intimate that it owed an absolute duty of obedience to the Court of Military Appeals, however. The Court of Military Appeals has no direct decisional responsibility for the civil implications of its rulings. To the court system which must bear the responsibility for determining and enforcing those civil implications must go the theoretical right to make independent decisions on all relevant issues of law as they apply to those civil effects. However, it is clear that the Court of Military Appeals should usually be followed. Only under the most unusual circumstances should the civil court substitute its judgment for that of the Court of Military Appeals. The substantive questions raised by the *Ortiz* and *Greenwell* decisions do not present such circumstances. The retrospectivity determination inherent in the *Ferry* decision does.

This case is a bit of an anomoly. In the context of civilian criminal law, a mis-convicted person might sue the

state only for the correction of records, and the return of fines. The money impact of fines in a civilian criminal context is very much less. Fines are not often levied, and less often collected in the average civilian case. In the military, since the sovereign is the employer and the paymaster, and since absent a sentence of forfeiture a soldier must be paid even in jail, forfeitures are levied as the rule. It should be noted that the impact of a sentence to jail by a civilian court is the same—loss of income—but no right of action against the government can accrue from it. In the military context, because the criminal jurisdiction arises from and has implications for a quasi-employment contract, a mis-convicted person can sue the state for such loss of income.

In the civilian context, a retroactive ruling that does not throw open the doors of the jails has little probability of precipitating a dislocating impact anywhere. In the military context, it has little such impact within the confines of the military justice system itself. However, the impact may be massive in the civil courts bailiwick. The almost off-the-cuff determination of retroactivity in *Ferry* cannot have been the product of a thorough examination of the impact that it might have on the civilian courts. It must have been merely the product of an incantation of the traditional Blackstonian effects of jurisdictional failure which raised no real problems within the Court of Military Appeals field of vision at the time. Indeed, it could be argued that the Court of Military Appeals could not properly have denied retrospective application to *Greenwell* within its own bailiwick because the proper magnitude of impact simply was not present within the military system itself to overcome the general rule of retrospectivity of decision. It is not so obvious that the traditional Blackstonian effects of jurisdictional failure are appropriate in the determination of the civil implications of *Greenwell* which are the sole responsibility of this Court to decide.

All concepts of jurisdiction spring from the assumption that the lawful power of all men or bodies of men in official capacities should be limited. The concept of limited power and therefore the concept of jurisdiction is necessary to prevent any single man or body of men from boldly arrogating to themselves tyranical power, from consolidating such power by degrees, or from exercising arbitrary or arrogant power outside the framework of a rule limited system, and then being able to call their actions legal. It is centrally necessary to any system of checked and balanced power.

Our ideas of jurisdiction and its attributes have been formed over a thousand years of legal evolution. They serve an immensely important role in describing to us the ways in which power is limited. Their role is so important that they should be tampered with only for the most cogent reasons, for they are like a living organism: It is difficult to predict all the consequences that even a small change in the traditional incidents of jurisdiction may have, or its effect on the vitality of those doctrines in protecting each of us from the arrogance of tyranical power.

Still, it must be admitted that sometimes the rigidity of traditional concepts of jurisdiction can have extreme effects which do not seem warranted. Jurisdiction traditionally either exists or does not exist. The common law made no distinction between a kangaroo court, and a court whose judge had by mistake been issued the improper commission. Both tribunals lacked jurisdiction equally. The proceedings of both tribunals were totally void. The common law looked not to the reasonableness or unreasonableness of the decisions which had led to the exercise of power, but to its metaphysical presence or absence.

This Draconian conceptual approach gives maximum protection against the improper assumption and exercise of

power. No circumstance can ratify its exercise, no appearance of reasonable mistake can vindicate its assumption, and consequently there are no rewards to be gained and held by its improper exercise. And this approach was well suited to the conditions of most of our legal history. Although the decision that a particular action was done without jurisdiction controlled in the case of the parties litigant, and conceptually controlled other cases as well, the vast bulk of the effected population was bound to be too poor and ignorant to take advantage of the ruling.[8] The last half-century has seen this Country take great strides in providing legal mechanisms to insure that mere ignorance or poverty are not the sole determining factors in how a person is treated by the process of the law. The class action device is often such a mechanism, for although it helps with judicial administration, it also helps in many cases make reality the promise that persons similarly situated will not be differently treated merely because some of them are ignorant of their rights.

Moving to make our best myths reality has caused some problems, however. This case is one of those problems.[9] The real reason for the idea of jurisdiction is to protect us all, not merely in the individual case, but over

8. This is well substantiated by the observation of Lord Camden in *Entick v. Carrington*, 95 Eng. Rep. R. 807 (1765), that the exercise by the Crown of the assumed power to issue general warrants for 70 years can only be explained by the fact that prior to the *Entick* case, such warrants had only been used against those without the means or the sophistication to resort to the courts: "It must have been the guilt or poverty of those upon whom such warrants have been executed, that deferred or hindered them from contending against the power of the Secretary of State and the Solicitor of the Treasury, or such warrants could never have passed for lawful till this time." id. at 818.

9. It is somewhat ironic that the economic impact which is the major factor militating in favor of prospectivity in this case might have gone unnoticed if the issue had not been raised in the context of a class action.

the long run, from unchecked power. Any application of prospectivity to a jurisdictional failure erodes that concept to some extent. Yet perhaps some very limited exception based on a sound analysis of the actual policies behind jurisdictional limitations, is more in keeping with both the approaches and the realities of 20th Century Jurisprudence.

The plaintiffs claim that the courts-martial in question did not provide proper guilt-determining agencies. Yet, had the Secretary of the Navy signed the order authorizing the convening authority, as he could have, and as it appears from his actions since *Greenwell,* he would have, had he known he had to, everything would have been the same. If there is outcome-affecting command influence in such small units, it is still there. Either it is enough of a factor in itself to constitute a denial of due process, or else the trials of the plaintiffs met due process standards on all outcome-affecting grounds, because the actual size of the units exercising special court-martial authority has not been changed by post *Greenwell* practice. Sailors and Marines are still subject to the same system on the operational level, which is where it counts in terms of outcome-determining due process.

Of course, some failures of "jurisdiction" logically require complete retroactivity in all its aspects. For example, if we deal with conduct which could not be made criminal, or has not been made criminal, or which could not be constitutionally punished, retroactivity must apply. There has been no crime, and no court could properly try the defendants in question. The failure of jurisdiction runs to the jurisdiction not merely of the courts but society as a whole. On the other end of the spectrum is the present case. Not only was the behavior complained of properly criminal, so that some tribunal could hear the

case, the very tribunal that heard the case could have heard it if the Secretary had made personal delegation. Further, the Secretary in every case almost beyond doubt would have signed the convening authority delegation personally if that had been thought necessary at the time. The Secretary's en bloc method of designation was a continuous Navy practice, predating the adoption of the Uniform Code of Military Justice, and was not obviously forbidden as a means of "empowering" a commanding office. The mistake was a good faith error not springing from a stiff-backed resistance from the limitations which a reasonable man would or should have seen imposed by the law. The procedure was followed under the Uniform Code of Military Justice for nearly 20 years before it was challenged.

This does not mean the Court disagrees with *Greenwell.* In fact, the Court has made its own study of the scheme of Article 23 in the context of the Uniform Code of Military Justice and the materials available indicating the legislative intent behind the words, and believes that personal designation is more in line with the statutory scheme, and was probably intended by the word "empowered." However, the Navy was not unreasonable in assuming that its past practices were still acceptable under the meaning of the word "empowered." The drafters probably intended to halt such practice, but did not make that intention clear enough to make the Navy aware that it should adopt a positive change of practice. The issue did not arise until *Greenwell.* The circumstance that made the issue surface was the Court of Military Appeals' awareness, after the decision of *Ortiz,* of the strong congressional intent that small commands not be given special court-martial power as a matter of routine.[10] The vices

10. The relevance of the *Ortiz* case to this case should be clarified at this point. The defendants have contended that even if

of bloc designations under 23(a)(7) in rendering such grants routine only then became apparent. Only then did the Court of Military Appeals analyze closely 23(a)(7) and decide that the Secretary's practice was forbidden by

10. (Cont'd.)
Greenwell is correct and applied retroactively, recovery must be denied plaintiffs because *Ortiz* was incorrectly decided and 10 U. S. § 823(a)(6) provides an independent direct congressional grant of authority to the courts-martial in question. Because of the way this case has been decided, we need not discuss this issue at length except to indicate that, as in the case of *Greenwell,* this Court has made an independent evaluation of the *Ortiz* decision and is in substantial agreement with it. Section 823(a)(6) may not originally have been intended to grant special court-martial convening authority to *any* command completely within a single service. The structure of § 823 (a)(6) suggests that it is a unification provision, a saving clause to grant special court-martial convening authority to joint units analogous to that granted units of the individual services in § 823 (a)(2), (a)(3), (a)(4) and (a)(5). Thus read, the word "command" should not be read to indicate a unit smaller than the "battalion or corresponding unit" of the other sections. Consequently, the pre-*Ortiz* use of § 823(a)(6) was mistaken. There is no direct legislative history on the role of § 823(a)(6) as a unification provision, but the following quotation from the prepared statement of Prof. E. M. Morgan of Harvard, drafter of the Uniform Code of Military Justice, to the Senate Armed Services Subcommittee is helpful in elucidating the reasons for and uses of unification provisions, even though it relates to 10 U. S. C. § 817, not § 823:

> "Most of the articles consist of a rewording and revision of provisions found at present in both the Articles of War and the Articles for the Government of the Navy. Article 17, however, is new in that it provides reciprocal jurisdiction of courts martial. By its terms, each armed force shall have court martial jurisdiction over all persons subject to the uniform code. There is thus provided authority for any Army court martial to try either its own personnel or the personnel of the Navy, the Air Force, or the Coast Guard. It is felt that this provision is necessary in the light of unification and by virtue of the tendency to have military operations undertaken by joint forces. Inasmuch as it is not possible at this time to forecast the different forms of joint operation which will take place in the future, the exercise of the reciprocal jurisdiction of one armed force over the personnel of other services has been left to the regulations of the President. In this way a desirable flexibility is attained which will enable the President to prescribe the types of operations in which reciprocal jurisdiction will be exercised." Hear-

it. In doing so, it adopted the construction of the lan guage more clearly comporting with congressional inten over that adopted of long-standing by the Secretary. Tha is a valid exercise of judicial power, and the specia expertise of the Court of Military Appeals on the actua tension between the Secretary's practice and the purpos of Section 823 render the decision in *Greenwell* unarguabl

The Secretary, according to his attorneys, has con tinued to empower small units as routinely and widel as before by his power under § 823(a)(7). Since suc routine exercise, while arguably bad practice, does no produce courts-martial so shot with command influence a to be unconstitutionally unfair, that is not a problem fo this Court's consideration. At least the Secretary mus sign each order now, and the policy of routine and wide spread authorization will not be continued merely b inertia and abdication to the military, but by the continu ing conscious decision of the civilian entrusted by Congres with checking the military.

Because *Greenwell* was right does not mean it shoul be retroactive. It was at least as much a prophylacti as a remedial decision.

But there is a major unresolved issue lurking behin any consideration of prospectivity. The main considera tion militating for prospectivity in this case is the impac

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10. (Cont'd.)

ings on S. 857 and H. R. 4080 (UCMS) before a Subcommitte of the Senate Committee on the Armed Services, 81st Congres 1st Session, p. 35 (1949).

It appears to this Court that the main purpose of § 823(a)(6 was to foreclose the argument by persons tried by a special court martial of a joint operations unit analogous to a detached battalio that, since the unit was not a unit of any one of the armed force individually, no authority for special courts-martial existed unde § 823(a)(2)-(a)(5). It was not intended, as the *Ortiz* Cou properly concluded, to extend special court-martial convening au thority below the detached battalion level within a single servic

of retroactivity on the public treasury, both in direct refunds to the serviceman involved, and also in the payment of sufficient clerical personnel to make the corrections which would be necessitated by retroactivity, and which would constitute a massive undertaking. But can a refusal to grant retroactive effect to a decision be based primarily on "mere" considerations of public expense. That is exactly what is at stake in this case. The Court of Military Appeals has already ruled that the Navy can make no use of *Greenwell*-type records in the military justice system. This Court's decision will in no way diminish that ruling. Indeed, it could not. There is little benefit to the Navy or the cause of general law enforcement that these specific records of petty crimes be maintained, and petty the crimes must be, since a special court-martial may not impose a sentence of more than six months imprisonment.

Yet the potential liability to the public treasury is massive, in terms of the cost of correction, refund of forfeitures and payment of damages and back pay suits. It might be argued that the forfeitures are merely being returned to their rightful owners, but that begs the question. If the total burden on the treasury for correction, refund and damages is merely $1000 per man, this is a current drain of $30,000,000 from the public monies, and a massive disturbance of the financial status quo.

These factors were thought proper for consideration by the pro-prospectivity plurality in *Gosa v. Maiden*, — U. S. — 1973. But the usual factor of the public interest in being protected from mass release of felons was present there also, to an indeterminate degree. May the Court properly play money changer with the integrity of the concept of jurisdiction, and with the usual rule of retrospectivity of decisions? It is a dangerous course yet the

answer is necessarily yes. If a technical defect of jurisdiction were found which existed in every court-martial in the last century, the courts would not be required to bankrupt the government to pay homage to the traditional implications of a jurisdictional failure. That massive public expense may alone justify prospectivity is in the extreme case self-evident.

Yet is $5,000,000 or $30,000,000 or $100,000,000 enough. Absent the precipitation of a gross public financial crisis, is any amount of mere money enough?

Gosa v. Maiden is of little help, and in fact probably renders the decision more difficult. *Gosa* and its companion case of *Warner v. Flemmings* dealt with the issue of whether or not the Supreme Court's decision in *O'Callahan v. Parker,* 395 U. S. 258, 197, was to be applied retroactively.

O'Callahan had held that Congress did not have the power under the Constitution to empower the military court system to try a member of the military for a non-service related crime if the defendant was not thereby accorded the usual Constitutional rights of trial by jury, indictment by a grand jury, et al. The decision in *O'Callahan* was couched in "jurisdictional" terms, and obviously does deal with a limitation upon the power of Congress. Yet, decisions holding that certain procedural safeguards must be accorded in certain contexts, do not fit comfortably within the traditional concept of jurisdiction, and are closer in many ways to the concept of jurisdiction-in-quotes which was elaborated on to some extent by Mr. Justice Douglas in his separate opinion in *Gosa,* and which is traceable more or less directly to the decision of *Johnson v. Zerbst,* 304 U. S. 458 (1938).

In *Gosa,* the Fifth Circuit held *O'Callahan* not to be retroactive, using the usual test of *Stovall v. Denno,* 388

U. S. 293 (1967). In *Warner*, the Second Circuit held that *O'Callahan* was retroactive because it involved a jurisdictional issue.

Although the four Justice plurality in favor of prospectivity spoke in its opinion of a "holding", their views were not in fact a holding. Four Justices favored retrospectivity on the basis that the issue involved was jurisdictional. Four Justices favored prospectivity after a *Stovall v. Denno* analysis. One Justice voted for further argument. It is true that the Fifth Circuit was affirmed in *Gosa*, and that the Second Circuit's result was reversed in *Warner*. But the vote on the crucial issue was a tie, and the Second Circuit was reversed because three Justices who did not vote for prospectivity found the Second Circuit case to involve a service related crime. If both cases had involved a clearly non-service related crime, both would have been affirmed on a 4-4 tie vote, with Justice Douglas voting for more argument. Exactly what will happen in the future is anybody's guess, literally.

If the relevant variable in the Supreme Court proves to be how clearly a given issue of traditional jurisdiction, *Greenwell* will be held retroactive, for it involves more clearly what Blackstone would have called jurisdictional issue than did *O'Callahan*. This Court does not believe that *Stovall v. Denno* will be applied en grosse to an examination of jurisdictional issues, but it may be adopted in a narrowed form. If the relevant variable proves to be an analysis based on the importance of the issue in the scheme of properly allocated and limited power, and its impact on outcome determination viewed in light of the dislocating impact of a holding of retrospectivity, then *Greenwell* should seriously be considered for prospective application, for it is more clearly a candidate for prospectivity on such an analysis than was *O'Callahan*.

This area of the law is currently in the early stages of evolution, and the proper course to follow is not clearly marked. It is a difficult area, and not without its dangers, both for the image of the judicial process in general, as has been noted quite persuasively by Professor Mishkin in his forward to the Harvard Review of the 1964 Supreme Court Term, 79 Harvard Law Review 56, and also to the vitality of jurisdictional limitations to protect us from arbitrary power. The Court does not believe that the test of *Stovall v. Denno* will be applied broadly to jurisdictional questions, but that ultimately some narrow and separate test will be so applied, and that jurisdictional questions will be allowed prospectivity in limited circumstances.

This Court will attempt to frame no general rule. It merely holds that, when a jurisdictional defect springs from a technical failure to empower a tribunal, and that tribunal could have been properly empowered, and that when the mistake which led to the jurisdictional failure was a reasonable mistake, made in good faith, and with no hint of an intentional improper assumption of power, or a stiff-backed resistance to the clear mandate of existing law, that then a court may consider applying the decision which strikes down such jurisdiction only prospectively. Further, this Court finds that under all the circumstances of this case, and in consideration of the magnitude of the financial impact upon the public monies that a holding of retroactivity in this case would impose, the decision of the Court of Military Appeals in *U. S. v. Greenwell* should be accorded only prospective application in the civil courts of the United States.

Only one housekeeping issue remains to be dealt with. The plaintiffs in this case have sought to represent a class comprised, not only of those persons tried by courts-martial convened pursuant to the authority of JAG Manual Section

.0103(b)(5), which was struck down in *Greenwell*, and pursuant to which both of them were tried, but also persons tried pursuant to the authority of other en bloc designations under § 823(a)(7) struck down by the Court of Military Appeals after *Greenwell*. The Court entered an Order drawing the class over-broadly. The Court does not now feel that the named plaintiffs have standing to challenge any court-martial brought under any Section other than .0103(b)(5) of the JAG Manual, and further feels that the issues raised in applying the later decisions retroactively for civil purposes may be different than the issues raised in this case, at least as regards retroactivity to the date of the *Greenwell* decision. Accordingly, the Court's previous order defining the class will be amended to cover and bind only those people tried by special courts-martial convened under Section .0103(b)(5) of the JAG Manual of the Navy between the decision in *Ortiz* and the decision in *Greenwell*, and summary judgment will be entered for the defendants and against the plaintiffs on the issue of liability in this case.

ORDER

AND Now, to wit, this 28th day of September, 1973, the previous Order of this Court designating this case a class action generally is hereby VACATED. This case is designated a class action on the claims of the named plaintiffs for relief in the nature of mandamus only, to proceed under FRCP 23(b)(2). The class is defined as all individuals tried by special courts-martial of the Navy convened pursuant to Section .0103(b)(5) of the Manual of the Judge Advocate General of the Navy between October 29, 1965 and May 28, 1970. The motion of the plaintiffs for summary judgment is hereby DENIED. The motion of the defendants for summary judgment is hereby GRANTED, and the Clerk is directed to enter judgment for the defendants and against the plaintiffs in the above captioned case.

IT IS SO ORDERED.

CLARENCE C. NEWCOMER,
Clarence C. Newcomer, *J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1996

RICHARD E. BROWN, on Behalf of Himself and All Others Similarly Situated,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

RICHARD E. BROWN and DAVID L. TAYLOR,
Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 24, 1974

Before ADAMS, HUNTER and GARTH, *Circuit Judges*

Harold E. Kohn
Aaron M. Fine
Allen D. Black
Arthur M. Kaplan
Mark E. Goldberg
Attorneys for Appellants

Irving Jaffe
Robert E. J. Curran
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Michael Kimmel
Attorneys for Appellees

OPINION OF THE COURT

(Filed December 31, 1974)

HUNTER, *Circuit Judge:*

This is a class action brought by individuals who were convicted by special courts martial that were convened by officers in the United States Navy and Marine Corps under what the United States Court of Military Appeals subsequently held was an improper conferral of convening authority by the Secretary of the Navy under Article 23(a)(7), UCMJ, 10 U. S. C. § 823(a)(7) (1970). *United States v. Greenwell*, 19 U. S. C. M. R. 460 (1970). The plaintiffs claim that the *Greenwell* decision renders their convictions void and they seek to have their military records corrected accordingly. They also seek to recover the forfeiture of pay and allowances adjudged at their courts-martial as well as other damages.

The determinative question in this appeal is whether the decision of the United States Court of Military Appeals in *Greenwell* should be given prospective or retrospective application.[1] If that case is given retrospective effect, the

1. The appellees do raise two preliminary objections which, if meritorious, would lead to dismissal of the appeal without a decision on the retroactivity issue. However, we do not feel that either has merit. These claims are: 1) that Article 76, UCMJ, 10 U. S. C. § 876 (1970), bars any collateral attack on a court-martial conviction except through a writ of habeas corpus; and 2) that the entire action is barred under the doctrine of *res judicata*.

The first contention was exhaustively discussed by the district court and we reject the claim based on its decision. Opinion of the district court, 365 F. Supp. 328, 332-36 (1973). The second claim is without merit and will be rejected without further discussion.

Finally, we should note the appellees' contention that the district court erred in finding that it had mandamus jurisdiction. Since the government concedes that there is Tucker Act jurisdiction, Brief of Appellee at 24, we must reach the merits of the appeal in any case. As a result, since we ultimately reject the plaintiffs' underlying cause of action, there is no need to finally decide whether mandamus jurisdiction exists since a decision on this question would do no more than expand or narrow the remedies available to the plaintiffs if they prevailed on the merits.

plaintiffs have what appears to be a good cause of action. On the other hand, if it is limited to prospective application only, a good cause of action is not stated.

This issue was presented to the district court by way of cross motions for summary judgment and that court ruled that *Greenwell* should only be given prospective application. As a result, the defendants' motion was granted and the plaintiffs filed this appeal. We have concluded that the district court's decision was correct and accordingly affirm.

In *Greenwell,* the special court-martial that convicted and sentenced the defendant was convened by the Commanding Officer, Student Company, Marine Corps Base, Camp Pendleton, California. That commander had gained the authority to convene special courts-martial when the Commanding General of Camp Pendleton designated Student Company a "separate and detached command for disciplinary purposes." Under the language of section 0103b(5), Manual of the Judge Advocate General, Department of the Navy, this designation automatically conferred convening authority upon the commanding officer of the unit so designated. That section read as follows:

> "b. Special courts-martial. In addition to those officers otherwise authorized [to convene special courts-martial] by article 23(a)(1) through (6), UCMJ, [10 U. S. C. § 823(a)(1)-(6) (1970)] the following officers are, under the authority granted to the Secretary of the Navy by article 23(a)(7), UCMJ, empowered to convene special courts-martial:
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> • • •
>
> "(5) All commanding officers and officers in charge of commands now or hereafter designated as separate or detached commands by a flag or general officer in command. . . ."

In *Greenwell,* the United States Court of Military Appeals decided that conferral of special court-martial convening authority by the method set forth in section 0103b(6), JAG Manual, was illegal. The court began its discussion by noting that that section was explicitly designed to grant convening authority solely pursuant to the Secretary of the Navy's statutory authority under Article 23(a)(7), UCMJ, 10 U. S. C. § 823(a)(7) (1970). It then observed that under Article 23(a)(7) only commanding officers who are "empowered by the Secretary concerned" can convene special courts-martial, and interpreted this language to mean that the granting of convening authority under 23(a)(7) could only be effective if that power was personally conferred by the Secretary himself.[2]

Under this view of the statute, the conferral of convening authority upon the Commanding Officer of Student Company under the procedure set forth in section 0103b(5), JAG Manual, became suspect since he did not receive his authority directly from the Secretary. Instead, the Secretary conferred convening authority upon the commanding officers of all commands designated as "separate or detached" by a flag or general officer in command. It was only when the Commanding General at Camp Pendleton conferred that designation on Student Company that the Secretary's authority was, in turn, conveyed to its commanding officer.

The court felt that under this two-step procedure, the Secretary had, in effect, delegated his power to grant convening authority under Article 23(a)(7) to the general

2. Article 23(a)(7), UCMJ, 10 U. S. C. § 823(a)(7) (1970), reads as follows:

"(a) Special courts-martial may be convened by—

* * * *

"(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned."

officers that designated units as "separate or detached." As a result, the court concluded that conferral of that power on the Commanding Officer of Student Company was invalid and that courts-martial convened by commanders operating under authority conveyed by the two-step procedure set out in section 0103b(5), JAG Manual, were void.

The appellants, in the present case, present two arguments to support their claim that this decision in *Greenwell* has retroactive effect. Their first claim is that the parties to this case have already litigated the issue before the United States Court of Military Appeals and that that court ruled that *Greenwell* was retroactive. Thus, they contend that the appellees are barred from relitigating the issue under the doctrine of collateral estoppel. Their second claim is that *Greenwell* is retroactive in any case under the relevant judicial tests.

I.

The appellants' collateral estoppel claim rests upon the decision of the Court of Military Appeals in *Ferry v. United States,* 22 U. S. C. M. A. 339 (1973). In that case, the government, by certificate of the Judge Advocate General of the Navy, initiated an appeal to the highest military court in a case involving a member of the plaintiff class. The defendant Ferry had been convicted of a crime and at the trial's sentence proceedings the government had sought to have a prior conviction introduced. This request was denied because the prior conviction was rendered by a special court martial convened by a commander who had received his convening authority under the procedure subsequently ruled improper in *Greenwell.*

The government, in its appeal in *Ferry,* contended that this prior conviction was not in any way affected by *Greenwell* because it had been completed before the *Greenwell*

decision was handed down. Thus, the question certified to the Court of Military Appeals read as follows:

> "Does the decision of the United States Court of Military Appeals in *United States v. Greenwell,* 19 USCMA 460, 2 CMR 42 (1970), have retroactive application, so as to render Prosecution Exhibit 3 (the record of conviction by a 1969 special court-martial convened pursuant to the *JAG Manual* provision found to be legally ineffective in *Greenwell*) inadmissible in evidence?"

We agree with the appellant when he suggests that the retroactivity issue presented in the instant case was also squarely presented to the court in *Ferry.* However, this fact alone does not make collateral estoppel operative since that doctrine only precludes "the relitigation of issues *actually decided* in former judicial proceedings." *Scooper Dooper, Inc. v. Kraftco Corp.,* 494 F. 2d 840, 844 (3d Cir. 1974) (emphasis added); *accord, Blonder Tongue Laboratories, Inc. v. University Foundation,* 402 U. S. 313, 323 (1971); *Lynne Carol Fashions, Inc. v. Cranston Print Works Co.,* 453 F. 2d 1177, 1182 (3d Cir. 1972).

In *Ferry,* the actual decision of the court did not reach the question certified to the court. Instead, Judge Quinn, writing the opinion of the court, framed his decision as follows:

> "Whatever effect *Greenwell* may have on a conviction in other situations, we have no doubt that a conviction invalid under *Greenwell* cannot be used to increase the sentence for a later offense. . . ." 22 U. S. C. M. A. at 340.

Thus, he specifically limited his holding to the facts presented in that case and refrained from deciding the broad question presented by the litigants.

Since Chief Judge Darden's concurring opinion indicates an intent to follow Judge Quinn's decision on this issue,[3] we conclude that the majority of the court in *Ferry* did not reach the question of *Greenwell's* overall retroactivity. As a result, the *Ferry* decision does not bind us on that issue and we are free to decide it in this litigation.[3a]

II.

When we look to the merits of the retroactivity issue, we are faced at the outset with a threshold requirement that must be met before a limitation on the retroactivity effect of a decision can even be considered. In *Chevron Oil Co. v. Huson*, 404 U. S. 97 (1971), the Supreme Court indicated that,

> ". . . the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . ." *Id.* at 106.

Appellant contends that this threshold requirement is not met. We cannot agree. While no past precedent was overruled by *Greenwell*, we feel the case did decide "an issue of first impression whose resolution was not clearly

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3. Chief Judge Darden's discussion of this issue reads as follows:

> "I concur in Judge Quinn's determination that the retroactivity of our decision in *United States v. Greenwell* . . . prohibits the use of a conviction that it invalidates to enhance the punishment of the accused in a subsequent trial."

3a. It may well be, as appellant suggests, that a decision cannot be retroactive for a single purpose without being retroactive for all purposes. *See* Reply Brief of appellants at 9. However, the court in *Ferry* apparently felt that they could order retroactivity for a particular purpose only. Thus, even if this assumption was incorrect, the fact that it was made means that that court did not decide the broad issue of retroactivity that is before us in this case.

foreshadowed'' so that it falls within the second part of the test laid out in *Chevron Oil.*

The only case we are referred to that arguably touched on the issue in *Greenwell* before that case was decided is *United States v. Ortiz,* 15 U. S. C. M. A. 505 (1965), petition for reconsideration denied, 16 U. S. C. M. A. 127 (1966). In that case, as in *Greenwell,* the legality of the conveyance of special court-martial convening authority to a company commander under section 0103b(5), JAG Manual, was under review. However, at the time of the *Ortiz* decision, section 0103b(5), JAG Manual, was written in a way that made it unclear whether that section conferred the special court-martial convening authority enumerated in Article 23(a)(6), UCMJ, or the authority enumerated in Article 23(a)(7).[4] Thus, in *Ortiz* the court first concluded that section 0103b(5), JAG Manual, only conferred the convening authority that is outlined in Article 23(a)(6) and only then went on to hold that the procedure outlined in that section was improper.

By first interpreting section 0103b(5), JAG Manual, in this way, the court was able to limit itself to a single statutory question; that is, the validity of section 0103b(5), JAG Manual, as a conveyance of Article 23(a)(6) authority. By the time the *Greenwell* case arose, however, section 0103b(5), JAG Manual, had been re-written so that the section no longer conferred Article 23(a)(6) convening authority and instead unequivocally conferred the convening

4. These sections read as follows:

"(a) Special courts-martial may be convened by—

* * * *

(6) the commanding officer of any separate or detached command or group of detached units of any of the armed forces placed under a single commander for this purpose; or

(7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned."

authority enumerated in Article 23(a)(7). As a result, the court in that case had to decide the issue that the *Ortiz* court avoided: the validity of section 0103b(5), JAG Manual, as a conveyance of Article 23(a)(7) convening authority. Thus, the issue decided in *Ortiz* was entirely distinct from the issue decided in *Greenwell* and the *Greenwell* decision involved an issue of "first impression" within the meaning of the *Chevron Oil* case.

Moreover, we cannot conclude that the *Greenwell* decision was "clearly foreshadowed" by the decision in *Ortiz*. Indeed, the court in *Ortiz* closed its opinion denying the government's petition for reconsideration with the following statement:

> "In summary, as we said before, we have no reservations about the broad powers of the Secretary of the Navy under Code, *supra*, Article 23(a)(7), to empower commanding officers, such as that of the 2d Bridge Company, to convene special courts-martial. In the regulations before us, he has not done so. In consequence, we adhere to our original opinion and reaffirm our previous decision in the case." 16 U. S. C. M. A. at 131.

Thus, the decision in *Ortiz* did not clearly foreshadow the narrow reading of Article 23(a)(7) announced in *Greenwell*. On the contrary, it specifically affirmed the Secretary's "broad" power under that Article.[5]

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5. The appellants also contend that the *Greenwell* decision was "clearly foreshadowed" by a letter of the Secretary of the Navy written on September 21, 1942. Appendix to Brief of Appellee at 7c-8c. The letter states that the Secretary cannot delegate his power to designate convening authorities to others.

However, in *Greenwell* the question was not whether the Secretary could delegate his authority. The only issue was whether the two-step process set out in section 0103b(5), JAG Manual, did, in fact, constitute a delegation. Thus, we cannot accept the suggestion that the Secretary's letter clearly foreshadowed the decision in *Greenwell*.

As a result, we believe that the *Greenwell* decision fits the second part of the *Chevron Oil* test. It decided "an issue of first impression whose resolution was not clearly foreshadowed." 404 U. S. at 106. We conclude therefore that it is a decision that can properly be considered for prospective application under the relevant judicial criteria.

The next question that must be resolved is precisely what criteria should be used in order to decide whether *Greenwell* is to be given prospective or retroactive effect. The government assumes that the relevant criteria are those set out in *Stovall v. Denno*, 388 U. S. 293, 297 (1967). The appellants, however, strongly suggest that the rule set out in *Robinson v. Neil*, 409 U. S. 505 (1973) and *United States v. U. S. Coin & Currency*, 401 U. S. 715 (1971) must be applied.

In *Gosa v. Mayden*, 413 U. S. 665 (1973), the dissenting opinion of Justice Marshall summarized the decisions relied upon by the appellants in the following way:

> "Robinson involved the retroactive application of the decision in *Waller v. Florida*, 397 U. S. 387 (1970), that the Fifth Amendment's guarantee, made applicable to the States through the Fourteenth Amendment, that no person should be put twice in jeopardy for the same offense barred an individual's prosecution for a single offense by both a State and a municipality of the State, that is, a legal subdivision of the State. *U. S. Coin & Currency* held retroactive the Court's prior determination that the Fifth Amendment privilege against compulsory self-incrimination barred the prosecution of gamblers for failure to register and to report illegal gambling proceeds for tax purposes, see *Marchetti v. United States*, 390 U. S. 39 (1968); *Grosso v. United States*, 390 U. S. 62 (1968).

In deciding whether to give retroactive effect to *Waller, Marchetti,* and *Grosso,* the Court rejected contentions that it should apply the three-prong test employed in cases such as *Stovall v. Denno,* 388 U. S. 293 (1967), *Desist v. United States,* 394 U. S. 244 (1969), and *DeStefano v. Woods,* 392 U. S. 631 (1968). In *U. S. Coin & Currency* Mr. Justice Harlan, speaking for the Court, explained:

> 'Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial. *Linkletter v. Walker,* 381 U. S. 618 (1965); *Tehan v. Shott,* 382 U. S. 406 (1966); *Johnson v. New Jersey,* 389 U. S. 719 (1966); *Stovall v. Denno,* 388 U. S. 293 (1967). Rather, *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance.' 401 U. S., at 723.

"The *Robinson* Court adopted essentially the same view of the Waller decision concerning the Double Jeopardy Clause and multiple prosecutions by different legal subdivisions of a single sovereign. See 409 U. S., at 508. In this case, too, we are concerned, not with 'the implementation of a procedural rule,' but with an unavoidable constitutional impediment to the prosecution of particular conduct." *Id.* at 700-01.

Appellants contend that the instant case presents an analogous situation because the *Greenwell* decision involved a question of jurisdiction. Thus, they conclude that the decision must be given retroactive application. Appellants summarize this position in the following way:

> "Likewise, where as here the court lacked jurisdiction or power to proceed, the question of the reliability of its fact-finding processes does not even arise. Inquiry must stop at the threshold question whether the court had the power to engage in fact-finding processes at all." Brief of Appellants at 24.

This argument has much to recommend it, and, in fact, resulted in a 4-4 split amongst the Justices of the Supreme Court in *Gosa*. However, in this Circuit, the issue is not one of first impression. In *McSparran v. Weist*, 402 F. 2d 867 (1968), *cert. denied* 395 U. S. 903 (1969), Judge Freedman, speaking for the Third Circuit sitting *en banc*, held that a decision limiting federal diversity jurisdiction should be given prospective application only. In so holding the court stated the following:

> "It is true that we deal here with a jurisdictional question. But the notion that 'jurisdiction' is a subject of some magical quality so that a decision against jurisdiction prevents according recognition to other relevant considerations must yield to the knowledge that it is our construction of the statute which determines in the present case whether jurisdiction exists or is absent." *Id.* at 877.

We feel that this holding effectively precludes us from ignoring the criteria that are normally weighed in determining whether a decision should be given prospective or retroactive effect.

Appellants, however, assert (in effect) that this holding was overruled by the Supreme Court in *Gosa*. They reach this conclusión by adopting the following assessment of the plurality opinion in *Gosa:*

> "Mr. Justice Blackmun's plurality opinion, by its efforts to establish that *O'Callahan v. Parker*, 395 U. S.

258 (1969), was not a decision dealing with jurisdiction in its classic form, implicitly acknowledges that if *O'Callahan* were in fact concerned with the adjudicatory power—that is, the jurisdictional competency—of military tribunals, its holding would necessarily be fully retroactive in effect. . . ." *Gosa*, 413 U. S. at 693-94 (Marshall, J. dissenting) (citation omitted).

We cannot accept this interpretation of the plurality opinion. While it did discuss the procedural rights that were effected by the *O'Callahan* decision, it never denied the fact that that decision spoke to a jurisdictional issue. Thus, since there has been no determinative ruling by the Supreme Court on this question, we are bound by *McSparran*. As a result, we must look beyond the jurisdictional nature of *Greenwell* and decide the prospectivity question according to the criteria set out in *Stovall v. Denno*, 388 U. S. 293 (1967). *See United States v. Zirpolo*, 450 F. 2d 424, 432 (1971).[6]

In *Stovall v. Denno* the Court stated that the criteria guiding a decision on retroactivity are: "a) the purpose

6. We note that even if we were not bound by our decision in *McSparran*, we could not simply apply the reasoning of *Robinson v. Neil*, *supra*, and *United States v. U. S. Coin & Currency*, *supra*, to the facts of this case. In each of those cases, the new rule of law being tested for prospective application had the effect of ending the defendants' criminal liability. The rule in *Marchetti* and *Grosso* barred the prosecution of gamblers for failure to register and report illegal gambling proceeds for tax purposes, and the decision in *Waller* barred the prosecution of any defendant by a State when that defendant had already been tried and convicted by a subdivision of that State for the same act.

In this case, however, the facts are different. The defendants whose convictions would be invalidated under the *Greenwell* rule are still theoretically liable for their criminal act. The *Greenwell* decision only dealt with which court could try the offense and never suggested that the offense could not be tried at all. Thus, the decisions in *Robinson v. Neil*, *supra*, and *United States v. U. S. Coin & Currency*, *supra*, appear to be distinguishable.

to be served by the new standards; b) the extent of the reliance by law enforcement authorities on the old standards, and c) the effect on the administration of justice of a retroactive application of the new standards." 388 U. S. at 297. However, the most important of these three criteria is the first one. *Desist v. United States,* 394 U. S. 244 (1969). As this court stated in *United States v. Zirpolo, supra,*

> "[g]enerally, rulings not primarily designed to enhance the reliability of the fact-finding or truth-determining process have not been applied retroactively." 450 F. 2d at 432.

As a result, we begin by focusing on the purpose to be served by the rule announced in *Greenwell,* and asking whether it serves to enhance the reliability of the fact-finding or truth-determining process.

In *Greenwell,* the United States Court of Military Appeals was only concerned with the *procedures* used to confer convening authority upon certain commanding officers. Its purpose was never to *bar* these commanders from acquiring the right to convene special courts-martial because of any basic unfairness. Moreover, the *Greenwell* rule did not limit the Secretary's discretionary power in this area in any way; his power to confer convening authority was as great after the decision as it was before it. All that changed was the manner in which he could exercise this discretion.[7]

Thus, the same courts-martial under the same convening authority and with the same trial procedures that took place under the old rule could have also occurred under

7. Under the old procedure the Secretary simply granted convening authority to all commands that were designated "separate or detached" by a general or flag officer in command. Under the new procedure the general officer must go through the added step of submitting the name of the commander of the separate or detached command to the Secretary for official approval.

the new rule announced in *Greenwell*. We conclude therefore that the *Greenwell* decision was only designed to conform the procedure used to confer convening authority to the literal requirements of the statute and that it was not intended to improve the fact-finding procedures employed at the court-martial itself.[7a] As a result, the purpose of the new standard announced in *Greenwell* cuts in favor of prospectivity.[8]

7a. The dissent misreads our discussion on the purpose of *Greenwell* as a suggestion that "the defect corrected in *Greenwell* . . . is too 'technical' to constitute a jurisdictional error." (Slip opinion p. 3, n. 4). It is clear that *Greenwell* dealt with a jurisdictional issue (*supra* p. 15).

In determining that an improperly convened military court is without jurisdiction, *Greenwell's* purpose was to conform the procedure used in conferring convening authority to the requirements of the statute. Our discussion of the purpose to be served by the new rule in *Greenwell* deals with the first requirement of *Stovall*. It does not imply that *Greenwell* dealt with non-jurisdictional, "technical" errors.

8. We are aware that it might be argued that the Article 23(a)(7) statutory requirements are themselves designed to enhance the reliability of the truth-determining process and that the court was implementing this Congressional intent in *Greenwell*. It this is true, then the purpose of the new rule would be to enhance the truth-determining process in the ways that concerned Congress when it passed Article 23(a)(7).

Appellants, in essence, make this argument when they contend that the purpose of Article 23(a)(7) was to prevent the Secretary from losing control of his power to confer convening authority. They suggest that this loss of control was considered detrimental because it would result in a conferral of convening authority on the smallest units in the chain of command and that this would undermine the court-martial process in the following ways: 1) it would deprive the accused of the exercise of prosecutorial discretion by a mature and detached commander; 2) it would increase the risk of command influence; and 3) it would undercut the principle of civilian control of the military.

We do not find this argument persuasive for several reasons. First, we are not referred to any legislative history that suggests that Congress passed Article 23(a)(7) for the reasons outlined by the appellants, (nor have we been able to find any ourselves). It might be true that the purpose of Article 23(a)(7) was to prevent the conferral of convening authority upon small units and it might also

When we turn to the other two criteria listed in *Stovall v. Denno, supra,* our belief that *Greenwell* should be given prospective effect only is further re-enforced. There can be little doubt that there was significant reliance by the "law enforcement authorities" upon the pre-*Greenwell* interpretation of Article 23(a)(7). That interpretation provided one of the statutory bases for the promulgation of section 0103b(5), JAG Manual,[9] and was that section's sole statutory basis from 1966 to 1970.

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8. (Cont'd.)
be true that this was feared for the reasons suggested by the plaintiffs. However, we are cited to nothing that establishes these as facts.

Second, even if we accept plaintiffs' speculation on the purposes for Article 23(a)(7), we note that a procedure that provides civilian checks on the military, and seeks to control prosecutorial discretion is not designed to increase the reliability of the truth-determining process. We feel this is self-evident with the former objective. With regard to the latter, we observe that the decision to prosecute only decides who is subject to the truth-determining procedures and in no way affects those procedures themselves.

As a result, plaintiffs' theory of the purposes behind Article 23(a)(7) cannot promote their position on retroactivity unless they are correct in suggesting that Congress wanted to keep convening authority from the smallest units because in these units the possibility of command influence was greatest. However, this hypothesis is undercut by the plaintiffs' own suggestion that there are two other plausible purposes that might underly this legislative goal. Further, it is also undercut by the language of Article 23(a)(7) itself since that section does not bar the conferral of convening authority upon small units but instead only requires specific designation by the Secretary. In our view, if Congress was truly motivated by the desire to eliminate the increased "command influence" that is presumably inherent in the exercise of convening authority by the commanders of small units, they would have simply barred its exercise by commanders below a certain level. This was not done by Article 23(a)(7). In fact, that section actually facilitated the exercise of convening authority by these commanders by making that authority available to *all* commanders at the discretion of the Secretary.

In view of all of these considerations, we cannot accept this argument.

9. The United States Court of Military Appeals ruled in *Ortiz, supra,* that the Secretary of the Navy had been unsuccessful in his attempt to invoke Article 23(a)(7) as a statutory basis for section

In addition, we feel that the retroactive application of the *Greenwell* rule would have clear adverse effects upon the administration of justice. The defendants convicted by courts-martial convened by commanders who received their authority under the rule invalidated in *Greenwell* fall into two categories. The first category includes those defendants who are no longer in the service and those who remain in the service but who committed an offense upon which the statute of limitations has run. Since none of these defendants can be retried, invalidation of their pre-*Greenwell* convictions would have an obvious negative effect on the administration of justice. *See United States v. Zirpolo, supra,* 450 F. 2d at 433.

The second category includes all defendants that can be retried. For this group the more common effects on the administration of justice would come into play and would be accentuated by the military context that surrounds each of the offenses charged. As the appellee notes:

> "The evidence would now be stale and witnesses unavailable in many cases, and the burden of conducting retrials, requiring substantial dislocation of Navy and Marine Corps personnel from their regular duties, would create 'serious, adverse effects' on the military justice system and the service generally. . . ." *Brief of Appellee* at 55.

Thus, when the *Stovall v. Denno* criteria are considered the conclusion we reach is that *Greenwell* should only be given prospective effect. We therefore will affirm the district court's order granting summary judgment to the defendants.

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9. (Cont'd.)

0103b(5). JAG Manual. However, this ruling in no way negates the fact that the Secretary relied, in part, on that Article when he first promulgated section 0103b(5), JAG Manual.

III.

Before we end our opinion, we must finally deal with two issues raised by appellants concerning the district court's final definition of the plaintiff class.[10] Their first claim is that the court erred in limiting the class to persons tried under section 0103b(5), JAG Manual between October 29, 1965 and May 28, 1970.

As we understand the district court, its intent in so limiting the class was to restrict it to those individuals who were convicted by courts-martial convened by commanders given convening authority under 0103b(5) when that section was, in fact, conferring this authority pursuant to Article 23(a)(7), UCMJ. We feel that such an order was within the discretion of the district court, *see Katz v. Carte Blanche Corp.*, 496 F. 2d 747, 757 (3d Cir. 1974), and should be affirmed.

However, we note that this class probably does not include all persons tried by special courts-martial convened pursuant to section 0103b(5), JAG Manual, from October 29, 1965—i.e., from the date of the decision of the United States Court of Military Appeals in *United States v. Ortiz, supra.* It is true that it was as a direct result of the *Ortiz* decision that section 0103b(5), JAG Manual, was amended so that it effectively conferred convening authority pursuant to Article 23(a)(7). Nonetheless, we assume that there was some time lag between the *Ortiz* decision and the effective date of the amendment to section 0103b(5), JAG Manual, that was made in response to it. Thus, we will remand the case to the district court so that its order defin-

10. We note that the definition of the class remains relevant since this action will only be *res judicata* with regard to those individuals who are class members. We also note that appellees raise their own claims regarding the propriety of the class. However, since they never filed an appeal, these questions are not properly before us.

ing the class can be altered to reflect what appears to be its true intent.

The appellants' second class action claim is that the district court erred when it refused to permit class treatment of their back pay claims under the Tucker Act. We have reviewed the district court's reasoning on this point and have doubts as to whether its decision on the question was correct. *See* opinion of the district court, 365 F. Supp. 328, 337 (1973).

However, the effect of its decision was only to narrow the remedies available to the plaintiff class, if victorious. It did not result in any relevant narrowing of the underlying cause of action. As a result, since the plaintiff is not victorious under our decision in any event, our review of this issue would serve no useful purpose. Accordingly, we reach no final judgment on the validity of the district court's decision on this matter.

The case will be remanded so that the district court can reconsider its order defining the plaintiff class. In all other respects, the judgment of the district court will be affirmed.

ADAMS, *Circuit Judge,* concurring:

While I concur in the judgment of the Court, I reach such result by a different path. Thus it would appear appropriate to set forth my own views dealing with the resolution of the thorny issue now before us.

Plaintiffs here seek to have the holding of the United States Court of Military Appeals in United States v. Greenwell, 19 U. S. C. M. A. 460 (1970), made broadly retroactive. They urge that all courts-martial conducted under the procedure disapproved in *Greenwell* be declared void *ab initio,* that all records resulting from those courts-martial be expunged, and that all back pay and other for-

feitures flowing from sentences under those proceedings be ordered paid to the servicemen involved. This result follows inexorably, it is contended, because of the failure of the procedure, here dictated by the regulations, to conform to the statute creating special court-martial jurisdiction.

Certain salient facts are undisputed: The commander of any detached command may convene a special court-martial. Uniform Code of Military Justice, 10 U. S. C. § 823(a) (1959). The Secretary of the Navy has the power to designate commands as separate and detached for the purpose of establishing special court-martial jurisdiction. United States v. Greenwell, *supra;* United States v. Ortiz, 15 U. S. M. C. A. 505 (1965). Further, such designations may be made by the Secretary en bloc.

The Court of Military Appeals found that in promulgating section 0103b(5) of the JAG Manual,[1] the Secretary believed that he acted in an authorized fashion pursuant to the statutory mandate. Yet the Court held that, whatever the good intentions of the Secretary, the effect of section 0103b(5) was an improper delegation to certain commanders of the power to designate separate and detached commands for disciplinary purposes. *Greenwell,* 19 U. S. C. M. A. at 463.

In essence, then, the invalidity of courts-martial convened pursuant to section 0103b(5) lies in the administrative failure of the Secretary of the Navy *personally* to identify commands as "separate and detached," so that

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1. Manual of the Judge Advocate General of the Navy § 0103b(5).

"*Special courts-martial.*--In addition to those officers otherwise authorized by article 23(a)(1) through (6) [of the Code], the following officers are, under the authority granted to the Secretary of the Navy by article 23(a)(7) [of the Code], empowered to convene special courts-martial:

. . .

All commanding officers and officers in charge of commands now or hereafter designated as separate or detached commands by a flag or general officer in command. . . ."

such commands, in turn, would be enabled to convene courts-martial.

Plaintiffs urge that for want of this personal designation by the Secretary verdicts rendered by all special courts-martial not so designated are required to be overturned for all purposes for want of jurisdiction from the outset. I am unable to subscribe to such a mechanical view of the law, which would require that a collateral attack result in the retroactive application of a technical notion of jurisdiction. Such an automatic and unreasoned result would seem improper without inquiry into the nature of the collateral attack, and without an analysis of the underlying court-martial proceedings and the competing policy considerations that should be weighed in the adjudicative process.

The situation we are asked to pass on here is somewhat anomalous. While criminal convictions lie at the root of the matter, no further incarceration is imposed,[2] and the plaintiffs are seeking solely monetary and administrative relief. We are not confronted with the traditional collateral assault on a criminal conviction, that is, a habeas petition. Thus, the case presents an admixture of attributes of the civil field where repose is paramount and the criminal field where, although the era of absolute retroactivity is passed, current doctrines view favorably the possibility of retroactive application of new rules.

While it is unlikely that plaintiffs are entitled to rely on the relaxed finality rules of habeas,[3] the nature of their

2. Maximum confinement sentences by special courts-martial are six months. 10 U. S. C. § 819 (1959), as amended, 10 U. S. C. § 819 (Supp. 1974). Since the *Greenwell* decision in 1970, convictions under the procedure declared defective there have been routinely reversed. *See, e.g.,* United States v. Cunningham, 21 U. S. C. M. A. 144 (1971).

3. In a companion case to *Gosa v. Mayden,* 413 U. S. 665 (1973), Flemings, a released petitioner suing for correction of records, was treated no differently from Gosa, who brought a habeas action. Although the Supreme Court did not distinguish between

suit also renders it less amenable to successful collateral attack than when practices presently found unconstitutional are responsible for an individual's continued confinement. Less weighty policies favor retroactivity where, as here, the brute fact of incarceration is absent, judgments are final, and constitutional issues are not present.

I conclude that, viewed either as a collateral attack on a civil judgment or from the vantage of a habeas proceeding, plaintiffs cannot prevail. From the perspective of civil litigation, relief is foreclosed by principles of res judicata or collateral estoppel. But even assuming arguendo that this case is controlled by habeas corpus retroactivity doctrines, it would appear, first, that a finding of retroactivity is not required by precedent, but that a balancing process must be employed to reach a reasoned result; and, second, under such process, and in the context here presented, a broad retroactive application of *Greenwell* would not comport with the precedents and philosophy underlying the retroactivity doctrine.

Accordingly, it is appropriate to deal with the rules applicable to collateral attack, first in the civil field and then in the criminal field.

I. Civil, or Non-Habeas Corpus, Model of Collateral Attack on a Final Judgment

Where the plaintiffs considered subject to applicable—non-habeas—rule of res judicata, their collateral attack could not succeed, despite the allegation of defective jurisdiction in the first tribunal.[4] Admittedly, proper jurisdic-

3. (Cont'd.)
the circumstances of the collateral proceedings, such a distinction would not be precluded, for the cases of Gosa and Fleming were otherwise distinguishable. See *infra* part II 1(b).

4. Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 175 (1863). In *Gelpcke*, petitioners unsuccessfully challenged the force and effect of an earlier final decree regarding the status of bonds issued under

tion is generally considered a fundament, and want of jurisdiction may be raised at any time during trial or during the appellate process.[5] Based on this accepted doctrine, plaintiffs contend that even a final judgment rendered pursuant to an assertion of jurisdiction later shown to be vulnerable is void as though never rendered.

Taken alone, policies dictating vigilance to the proper exercise of jurisdictional authority might suggest such a result. But once a judgment has become final, such policies collide with the well-respected and forceful precepts favor-

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4. (Cont'd.)

a statute later held by the Iowa Supreme Court to be unconstitutional. *See also,* Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U. S. 358 (1932).

5. American Fire & Casualty Co. v. Finn, 341 U. S. 6 (1951); Mansfield, Coldwater & Lake Michigan Ry. Co. v. Swan, 111 U. S. 379 (1884); 1 J. Moore, Federal Practice ¶ 0.60[4] at 641 (1974). However, jurisdiction is a coat of many colors. Justice Douglas in United States v. Augenblick, 393 U. S. 348 (1969), suggests that the concept of jurisdiction is malleable, and he notes that upon occasion it has been redefined. *See also,* O'Callahan v. Parker, 395 U. S. 258 (1969).

Among the elements comprising the flexible jurisdictional fabric, it would appear that some components are not indispensable. For example, not every failure of jurisdiction requires a court to stay its hand, even in the case before it. In McSparran v. Weist, 402 F. 2d 867 (3d Cir. 1968), access to the federal court was circumscribed by tightening the diversity requirements. Nonetheless, the more generous older rule was applied, on equitable grounds, to the case before the court. This is similar to the jurisdictional holding in Chevron Oil Co. v. Huson, 404 U. S. 97 (1971), where a shorter statute of limitations period was applied only prospectively. *See also,* Cipriano v. City of Houma, 395 U. S. 701 (1969).

Nor is every order based on an unsustained assertion of jurisdiction void and enforceable. In United States v. United Mine Workers of America, 330 U. S. 258 (1947), the Court stated at pages 289-95 that even where a district court had no jurisdiction over the subject matter because of the Norris-LaGuardia Act, under certain circumstances an injunction might issue pending a determination of the jurisdictional question, and noncompliance with the injunction would appropriately be punished as contempt of court.

ing repose and ultimate finality to litigation.[6] Consequently, in civil litigation[7] want of jurisdiction—while a potential issue in any non-final case—is generally not a ground for collateral attack.[8] One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues.' "[9]

Chicot County Drainage District v. Baxter State Bank[10] illustrates this. Baxter held bonds of the Drainage District, which had undergone reorganization in federal

6. In *Gelpcke, supra* note 4, the Supreme Court held city bonds enforceable despite the late invalidation of the authorizing statute by the state's highest court. The Supreme Court relied on the interest in having questions "settled," and on the interim reliance by all parties on the legitimacy of the bond issue.

7. The same rule has been applied in the criminal area. For example, in Warring v. Colpoys, Circuit Judge, later Chief Justice, Vinson declined to issue a writ of habeas corpus, asserting ,"It is increasingly evident that 'jurisdiction' in the normal case is not subject to collateral attack. While habeas corpus is regarded more liberally than most forms of collateral attack, it is not to be used as an appeal or a writ of error." 74 U. S. App. D. C. 303, 122 F. 2d 642, 644, *cert. denied,* 314 U. S. 678 (1941) (citations omitted). The increased liberality accorded the scope of habeas in *Warring* was attributed to the question of personal liberty involved there, an issue not present in the case before the Court here. *See supra.*

8. Thus it has not been suggested that all judgments of three-judge courts would be overturned if it were ascertained, after such judgments were final, that, while the statute required the chief judge of the circuit personally to designate the additional judges required for each three-judge court, in fact for years the assignments had been made by the clerk of the court. 28 U. S. C. § 2284(1) (1965). Rather, it would seem that the interest in ending litigation would prevail, and a failure of jurisdiction in such circumstances would not vitiate judgments previously rendered under a presumption of properly founded jurisdiction.

9. Treinies v. Sunshine Mining Co., 308 U. S. 66, 78 (1939), *quoting* American Surety Co. v. Baldwin, 287 U. S. 156, 166 (1932) (footnote omitted). *See also* Chicot County Drainage Dist. v. Baxter State Bank, 308 U. S. 371 (1940); Stoll v. Gottlieb, 305 U. S. 165 (1938); McCormick v. Sullivan, 23 U. S. (10 Wheat.) 192 (1825); J. Moore, Federal Practice ¶¶ 0.60[5], 55.09 (1974).

10. 308 U. S. 371 (1940).

court in March, 1936. The district court exercised jurisdiction over the reorganization under a federal statute purporting to establish authority in the district courts to readjust the debts of financially-distressed subdivisions of a state. In May, 1936, in Ashton v. Cameron County Water Improvement Dist. No. One, the United States Supreme Court struck down as violative of the Constitution the statute that purported to give jurisdiction (298 U. S. 513). Subsequently, Baxter sued on bonds it had received prior to the reorganization. When the Drainage District interposed a plea of res judicata, Baxter asserted that the judgment of the district court was void because it had no lawful jurisdictional basis. The Supreme Court rejected this contention, stating:

> The actual existence of a statute, prior to such a determination [of invalidity], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. * * * Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.
> 308 U. S. at 374.

The validity of the statute might have been raised by the parties in the original debt readjustment suit, but it was not. Thus, the Court held that principles of res judicata concluded issues that could have been asserted as well as those actually litigated.

According to the Supreme Court, no exception to res judicata was warranted in *Chicot County*, notwithstanding

a later finding that the district court's exercise of jurisdiction was based on an unconstitutional statute. Despite the jurisdictional defect, the "parties [had been] brought before [the court] in accordance with the requirements of due process * * *." 308 U. S. at 376.

The jurisdictional defect here is less far-reaching than that asserted in *Chicot County*.[11] In the various courts-martial attacked in this suit, the flaw lay in the regulation which exceeded the statutory grant of authority, whereas in *Chicot County* the statute conferring power on the district courts fell as beyond the constitutional power of Congress to enact.

Under *Chicot County* the crucial element that would bar collateral attack on a judgment seems to be whether the party was afforded an opportunity to litigate.[12] Application of the *Chicot County* rule would preclude a collateral attack here, for it is not suggested that plaintiffs were unable to raise their jurisdictional objection at their courts-martial.[13]

If plaintiffs are considered on the same footing as those who attack a civil judgment collaterally, in the circumstances here there is no persuasive authority to support voiding the original judgments. Under the view that only habeas actions are relieved of the finality burden, res judicata mandates the outcome; there is no basis for

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11. *See also Gelpcke v. City of Dubuque*, 68 U. S. (1 Wall.) 175 (1863), notes 4 and 6, *supra*.

12. *See* Durfee v. Duke, 375 U. S. 106, 114 n. 12, citing Restatement, Conflict of Laws, § 451(2) (Supp. 1948); Restatement, Judgments, § 10 (1942).

13. A small class of cases creates a narrow exception to the "opportunity to litigate" rule, but no considerations are present in this case which would justify a result different from that of *Chicot County*. The exceptional cases have involved adjudications of federal issues in state courts. *See Kalb v. Feuerstein*, 308 U. S. 433 (1940); United States v. United States Fidelity Co., 309 U. S. 506 (1940).

this Court to consider altering the effects of the allegedly invalid exercise of special court-martial jurisdiction.[14]

II. The Habeas Corpus Model of Collateral Attack

The judgments here attacked are criminal convictions; therefore plaintiffs may argue that, although they are not in prison, this collateral proceeding has at stake certain aspects comparable to those determined in a habeas petition.[15] In habeas cases, considerations of finality are not dispositive, and if circumstances warrant relief then such relief is granted. Assuming for the purposes of argument that an analysis consonant with habeas corpus doctrine would be more appropriate than one comporting with civil litigation, the question we now address is whether the *Greenwell* decision should be applied fully retroactively to the plaintiffs.

1. Factors Advanced in Support of Requiring Retroactivity.

In criminal proceedings collateral relief has traditionally been available through habeas corpus,[16] a proceed-

14. For situations where prospective only application has been ordered for jurisdictional rulings in the civil field, *see* Chevron Oil Co. v. Huson, 404 U. S. 97 (1971) (statute of limitations); McSparren v. Weist, 402 F. 2d 867 (3d Cir. 1968) (diversity jurisdiction).

15. Plaintiffs' records carry a criminal conviction. Plaintiffs have forfeited wages, liberty, honorable discharges and veterans' benefits. For a discussion of the "collateral consequences" of criminal convictions, *see* Carafas v. LaVallee, 391 U. S. 234 (1968).

16. Access to habeas corpus relief in the federal courts is codified at 28 U. S. C. §§ 2241 et seq. Habeas corpus under 28 U. S. C. § 2255 is not available to plaintiffs because of the statutory requirement that a petitioner be "in custody" at least at the time a habeas petition is filed. *E.g.*, Gosa v. Mayden, 414 U. S. 665, n. 3 at 670 (1973); Carafas v. LaVallee, 391 U. S. 234 (1968). *See also* Hensley v. Municipal Court, 411 U. S. 345 (1973).

ing in which the law disavows the same type of interest in finality that characterizes the civil process. However, although post-conviction relief was afforded for wrongful incarceration, this has not meant that every new interpretation of law is retroactively applied to overturn convictions procured under an earlier questionable procedure or standard of law.[17]

Plaintiffs contend that, even though the issue of retroactivity is generally determined by a process of deliberation or balancing, three circumstances present here would in any event require full retroactivity. According to plaintiffs, these three considerations are: (a) that no defect in jurisdiction may be regarded as merely statutory, but must necessarily be cast as a due process question, and thus a holding of non-retroactivity is impermissible; (b) that any decision rendering a military conviction a nullity must perforce be fully retroactive because of the narrowly drawn jurisdiction of the military; and (c) that a decision either is retroactive or is not, and the holding in United States v. Ferry, 22 USCMA 339 (1973), that pre-*Greenwell* convictions may not be used to enhance punishment in a subsequent court-martial, must either be overruled or extended comprehensively to encompass full retroactivity.

Each of these arguments, if successful, would cut short further analysis and would, by the force of its own logic, require a holding that *Greenwell* is necessarily fully retro-

17. Linkletter v. Walker, 381 U. S. 618 (1965). The traditional Blackstonian view—also referred to as the declaratory theory—had been that constitutional rulings and interpretations by courts were wholly retroactive. The underlying rationale for the Blackstonian view of absolute retroactivity has been explored in a thoughtful article by Professor Mishkin in which he relates retroactive application of the law to the symbolic role of courts. Mishkin, The Supreme Court 1964 Term, Foreward: The High Court, The Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965).

active. Thus, it is essential that we treat each contention separately.

(a) Jurisdictional Defect

Collateral attacks on jurisdictional failures in criminal cases have been adjudicated only infrequently. Although the general rule in the civil area is that res judicata and interest in repose foreclose collateral attack on a final judgment even where jurisdictional deficiencies are alleged,[18] in the criminal field, the value of repose occupies a lower niche in the legal order. The traditional rule has been that a writ of habeas will be granted for the release of a prisoner jailed pursuant to an improper exercise of jurisdiction. Ex Parte Siebold, 100 U. S. 371 (1879). Yet access to the federal courts for a writ of habeas has no implications for the question whether a claimed jurisdictional defect at trial is to be applied in a broad retroactive manner. The rationale for permitting collateral attack differs from that governing retroactive application of law. As the Supreme Court has stated: "The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. No such service is performed by extending rights retroactively."[19]

The advisability of retroactive application of the jurisdictional *Greenwell* ruling must thus be weighed. Although strong precedent exists for declaring nonretroactive an interpretation of criminal law that narrows a court's jurisdiction, prior case law is not conclusive.[20] Yet the case-

18. *See* part I supra. Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371 (1940).

19. Kaufman v. United States, 394 U. S. 217, 299 (1969).

20. Gosa v. Mayden, 413 U. S. 665 (1973), discussed in part 2(b), *infra*, rules that O'Callahan v. Parker, 395 U. S. 258 (1969), should not be retroactively applied. *O'Callahan* had been viewed by many as a decision going to the core of the military courts' jurisdic-

by-case approach taken by the Supreme Court on questions of retroactivity where constitutional violations are at stake, together with the approaches taken by circuit courts, are persuasive that automatic retroactivity is not mandated by the jurisdictional nature of the *Greenwell* defect.

The question of the retroactive application of a narrowing jurisdictional interpretation of the criminal contempt statute was raised in Warring v. Colpoys.[21] Warring had been convicted under a construction of the statute that conferred power to punish for contumacious acts in the court or "so near thereto as to obstruct the administration of justice." After Warring's conviction was final, but while he was still incarcerated, the Supreme Court reinterpreted the statutory language to be geographically limiting. It was undisputed that Warring's acts were not criminal under the new statutory interpretation. Warring brought a habeas petition alleging that he was tried by a court wanting in jurisdiction, claiming that "the statute never gave the court contempt 'jurisdiction' over his type of offense."[22] Circuit Judge, later Chief Justice, Vinson, rejected this contention, holding that retroactive application of a new statutory construction was not warranted despite the narrower jurisdiction that resulted.[23]

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20. (Cont'd.)
tional power. So viewed, the determination by the Supreme Court to apply *O'Callahan* prospectively only would appear compelling here. The judgment of the Court eschews a "jurisdictional" characterization of *O'Callahan,* however.

21. 74 U. S. App. D. C. 303, 122 F. 2d 642, *cert. denied,* 314 U. S. 678 (1941).

22. 122 F. 2d at 646.

23. The Fifth and Tenth Circuits have also spoken on whether retroactive application is necessary where holdings concern jurisdiction. Schlomann v. Moseley, 457 F. 2d 1223 (10th Cir. 1972), *cert. denied,* 413 U. S. 919 (1973); Gosa v. Mayden, 450 F. 2d 753 (5th Cir. 1971), *aff'd,* 413 U. S. 665 (1973). In *Schlomann,* having squarely decided that O'Callahan v. Parker, 395 U. S. 258 (1969),

Although a civil action, McSparran v. Weist provides an example of a prospective-only jurisdictional decision. *McSparran* restricted the basis for diversity jurisdiction by holding that "manufactured"[24] diversity could not confer federal jurisdiction. 402 F. 2d 867 (3d Cir. 1968). The Court, sitting en banc, made the operation of the rule prospective-only, to be applied solely to causes of action arising after the date of the decision. Cases in which the plaintiff was an out-of-state fiduciary thus continued to be adjudicated, although no proper jurisdictional foundation was presented.[25] The Court stated, in language pertinent to the present case, "[T]he notion that 'jurisdiction' is a subject of some magical quality . . . must yield to the knowledge that it is our construction of the statute which determines . . . whether jurisdiction exists or is absent." 402 F. 2d at 877.

Apparently, the possibility of applying the *McSparran* holding retroactively to upset judgments that were then final was not even considered. Although such final judg-

23. (Cont'd.)

set clear jurisdictional bounds on the military courts, the court nevertheless concluded, "We are not persuaded that the jurisdictional terminology of *O'Callahan* compels us to refuse consideration of prospective application." 457 F. 2d at 1227.

In *Gosa,* while conceding that *O'Callahan* limited the power of the judicial forum, the Fifth Circuit denied *O'Callahan* retroactive application, holding "there is no arbitrary or simplistic basis for deciding retroactivity. The heart of the doctrine is a reasoned application of new constitutional precedent." 450 F. 2d at 759 (footnote deleted).

24. Appointment of an out-of-state guardian or executor for purposes of suit.

25. *See, e.g.,* Groh v. Brooks, 421 F. 2d 589 (3d Cir. 1970); Law v. Converse, 419 F. 2d 38 (3d Cir. 1969). Chevron Oil Co. v. Huson, 404 U. S. 97 (1971), is another case where a new jurisdictional rule, involving a statute of limitations, was applied prospectively only, because of reliance by the plaintiff there on an older, more liberal rule.

ments rested on flawed federal jurisdiction, they stood unchallenged.[26]

While want of jurisdiction is an elemental ground for the grant of habeas relief, the existence of a jurisdictional defect of limited proportions does not, as plaintiffs would have it, constrain this Court to find that the defect applies retroactively. To the contrary, courts have used the same weighing process to determine retroactive application of new rules where jurisdictional questions arose as in other situations, constitutional or statutory, where a claim of retroactivity was presented.

(b) Military Jurisdiction

Plaintiffs point out that the Supreme Court has reiterated the proposition that military jurisdiction is limited to that provided by statute and limited to that permitted by the Constitution. The Court has expressed the standard for the proper exercise of jurisdiction by military tribunals as "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[27]

Based on this, plaintiffs argue that the failure to follow a statute's precise prescription makes a military judgment vulnerable. As to a judgment challenged on direct appeal, admittedly no fair reading of the Supreme Court cases could support a different result. Runkle v. United

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26. Our research has not disclosed that any case was ever instituted to attack, collaterally, judgments predicated on jurisdiction that *McSparran* later held was nonexistent.

27. Toth v. Quarles, 350 U. S. 11, 22 (1955). The courts-martial at issue in this case concededly fall within the *Toth* definition of the proper scope of military disciplinary proceedings. *See also,* O'Callahan v. Parker, 395 U. S. 258 (1969); Reid v. Covert, 354 U. S. 1 (1957); McClaughry v. Deming, 186 U. S. 49 (1902); Runkle v. United States, 122 U. S. 543 (1887).

States [28] and McClaughry v. Deming [29] made clear that court-martial jurisdiction must be exercised in strict conformity with statutes, and therefore are strong support for the holding in the direct appeal in *Greenwell*. However, extension of *Runkle* and *Deming* to the question whether retroactive operation is mandated after such jurisdiction has been exercised and judgment is final is far from clear. In the cited cases the retroactivity issue was never raised. Hence, broad language in them regarding jurisdiction must not be read cavalierly as applying to a collateral attack situation such as presently before us.

Military courts are not unique in having their jurisdiction curtailed to fit the contours of statutes and the Constitution. The jurisdictional reach of other courts in other areas is also narrowly circumscribed. In *Chicot County, supra,* for example, the scope of bankruptcy jurisdiction of the federal courts was at issue. Responding to the assertion that a prior judgment of the district court was void because dependent on an improper exercise of jurisdiction under the statute, the Supreme Court stated:

> We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But nonetheless they are courts with authority * * *. Their determination of [questions of jurisdiction and statutory interpretation], while open to direct review, may not be assailed collaterally. 308 U. S. at 376.

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28. 122 U. S. 543 (1887). In *Runkle* the petitioner successfully challenged his discharge from the army because, in contravention of the statute, the President had failed to affix his approval to the court-martial proceedings.

29. 186 U. S. 49 (1902). In *Deming,* despite an express statutory prohibition, a volunteer officer in the army was tried by a court-martial comprised of officers in the regular army. The Supreme Court held, therefore, that the court-martial was without proper jurisdiction and a writ of habeas corpus lay.

The distinctive flavor of judicial opinions narrowing military jurisdiction proceeds from an awareness of the underlying constitutional privileges of which a citizen is deprived before a military tribunal, *e.g.*, indictment by grand jury, trial by petit jury, more vigorous interpretation of the confrontation clause.[30] Because of the loss of these valuable rights, stalwart judicial efforts have, in effect, protected citizens from undue exposure to the military forum. And the applicable decisions frequently have been cast in terms of jurisdictional limitations on courts-martial.

However, the appellants in their courts-martial were not denied any constitutional protections to which they were entitled. It is not suggested that holding *Greenwell* retroactive would permit a fairer trial in a differently constituted tribunal or, indeed, a trial different in any regard. Thus, those policies which might dictate a jurisdictional spear thrusting back to open final cases would not appear to have persuasive power in this case. Whatever new trials might occur if retroactivity were mandated would merely replicate procedures undergone once before.

Even where important constitutional considerations are present, retroactivity is not foreordained where a ruling limits the scope of military jurisdiction. In the recent case of Gosa v. Mayden, 413 U. S. 665 (1973), the retroactivity of O'Callahan v. Parker, 395 U. S. 258 (1969), was at issue. *O'Callahan* had held that military jurisdiction did not encompass the power to try servicemen in peacetime for non-service related offenses. Gosa was in custody after a court-martial and sought habeas relief. A petitioner in a companion case, Flemings, had already been released and was seeking correction of his military records. Arguing that their constitutional rights under the Fifth

30. O'Callahan v. Parker, 395 U. S. 258 (1969).

and Sixth Amendment had been curtailed by their military trials, the petitioners in *Gosa* contended that the *O'Callahan* rule should be retroactive.

Despite the fact that the Supreme Court had held in *O'Callahan* that trials by military courts of non-service related offenses in peacetime were invalid because such trials were beyond the constitutional limits of military jurisdiction, a sharply divided court in *Gosa* refused to grant relief.[31] Justice Blackmun, writing for himself, Chief Justice Burger, and Justices Powell and White stated, in language that supports the majority's position here, that in *O'Callahan:*

> [T]he Court certainly did not hold, or even intimate, that the prosecution in a military court of a member of the armed services for a nonservice-connected crime was so unfair as to be void *ab initio*. 413 U. S. at 675.

Justice Blackmun then used the *Linkletter-Stovall* approach, and held that, on balance, retroactivity was not warranted. In his analysis, Justice Blackmun looks to the likelihood of unfairness in result and concludes that:

> [T]he validity of convictions by military tribunals, now said to have exercised jurisdiction inappropriately over non service-connected offenses is not sufficiently in doubt so as to require the reversal of all such convic-

31. On the issue of retroactivity, four justices concluded that *O'Callahan* did not require retroactive application; four indicated that retroactivity was called for, although only two of these justices found it necessary to reach the question; and one justice (Douglas, J.) concluded that res judicata required that Gosa's petition be denied, and that Flemings' offense was service-related.

While I respectfully differ with Justice Douglas' application of the res judicata doctrine in a habeas corpus case, the application of res judicata in the case sub judice might be dispositive. *See* Part I *supra.*

> tions rendered since 1916 when Congress provided for [such trials].[32]

Justice Marshall wrote in dissent that *O'Callahan* presented a forceful case for retroactive application, because it

> [Dealt] with the constitutional limits of the military's adjudicatory power over offenses committed by servicemen. No decision could more plainly involve the limits of a tribunal's power to exercise jurisdiction over particular offenses and thus more clearly demand retroactive application.[33]

While the precise application of *Gosa* to our case is uncertain, the result of *Gosa* is manifest. Based on considerations either of non-retroactivity or res judicata, a majority of the Supreme Court held that Gosa would remain in prison despite the constitutional shortcomings of his court-martial. The circumstances of the present case appear to lead, in effect, to the same conclusion. Indeed, unlike *Gosa*, plaintiffs here have no grievance of constitutional dimension, and they are not presently imprisoned. It would thus appear that even the Justices who believed that *O'Callahan* warranted retroactive application might conclude differently in the present case, where "the constitutional limits of the military's adjudicatory power" are not at issue. 413 U. S. at 694.

The only consideration advanced to support an outcome here different from that in *Gosa* is that the flaw in the

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32. 413 U. S. at 676. The tone of Justice Blackmun's approach tends to refute the implication by Justice Marshall that any technical jurisdictional impairment would require a retroactive application.

33. 413 U. S. at 694. Justice Marshall expressed the philosophy of four members of the Court. Justice Brennan concurred; Justices Rehnquist and Stewart, believing *O'Callahan* to be wrongly decided, nevertheless concluded that its holding must be retroactive, in substantial agreement with Justice Marshall's reasoning. 413 U. S. at 692, 693.

procedure followed prior to *Greenwell* lay in the area of "jurisdiction in its classic form." 413 U. S. at 693. Yet, the invocation of jurisdictional deficiency does not end the matter. At least two courts of appeals had considered the retroactivity of *O'Callahan* prior to *Gosa*. Each concluded that *O'Callahan* was indeed a jurisdictional limitation on the court's power. Nonetheless, each court declined to apply *O'Callahan* retroactively.[34] And in the Supreme Court, although *O'Callahan* limited military jurisdiction on constitutional grounds, it was held non-retroactive in *Gosa*. The exercise of jurisdiction by a tribunal later held to have acted improperly will not suffice ipso facto to void a final judgment.[35]

Were this Court to hold *Greenwell* broadly retroactive, the result would indeed be incongruous. Gosa and those like him, convicted before *O'Callahan* and denied fundamental constitutional rights, would remain in prison. In contrast, those whose courts-martial denied them no constitutional rights, whose trials would be virtually identical regardless of whether the court-martial authorization were proper or not, but whose trials were improperly convened under the regulation struck down in *Greenwell*, would enjoy a lump sum grant of back pay, effective immunity from retrial,[36] and correction of records, with all the benefits that flow therefrom.

(c) The Impact of Ferry

As to trials conducted after *Greenwell*, the Court of Military Appeals in United States v. Ferry stated:

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34. Scholmann v. Mosely, 457 F. 2d 1223 (10th Cir. 1972), *cert. denied* 413 U. S. 919 (1973); Gosa v. Mayden, 450 F. 2d 753 (5th Cir. 1971), *aff'd* 413 U. S. 665 (1973).

35. McSparran v. Weist, 402 F. 2d 867 (3d Cir. 1968); Warring v. Colpoys, 74 U. S. App. D. C. 303, 122 F. 2d 642, *cert. denied* 314 U. S. 678 (1941). *See* discussion, *supra*.

36. *See infra* Part 3.

> Whatever effect *Greenwell* may have on a conviction in other situations, we have no doubt that a conviction invalid under *Greenwell* cannot be used to increase the sentence for a later offense beyond that which the accused would have received had that previous conviction not been considered. 22 U. S. C. M. A. 339, 340 (1973).

Plaintiffs here assert that *Greenwell,* retroactive to the extent it applies to the augmentation of sentence, must necessarily be extended further, to apply consistently and fully to all possible retroactivity issues. Retroactivity doctrines, it is maintained, are cumbersome and difficult of application without adding the further dimension of selective retroactivity. Plaintiffs urge that once the issue of retroactivity of a new ruling is determined, the consequences should and do extend to all related situations.

Yet it is clear that the doctrine need not be applied with such persistence as to expunge every potential utilization of an improper procedure. For example, in United States v. U. S. Coin & Currency, 401 U. S. 715 (1971), the Supreme Court announced the general retroactivity of its decisions in Marchetti v. United States, 390 U. S. 39 (1968), and Grosso v. United States, 390 U. S. 62 (1968), holding prosecutions under gambling regulation laws impermissible where a challenge to filing wagering registration forms was bottomed on the Fifth Amendment right against self-incrimination. However, on the very day *Marchetti* and *Grosso* were held retroactive, the Supreme Court announced in United States v. Mackey, 401 U. S. 667 (1971), that use of these same forms, once completed, to procure a tax evasion conviction was not a basis for retroactive application of the *Marchetti/Grosso* rule. Justice White, in a plurality opinion joined by the Chief Justice and Justices Stewart and Blackmun, stated "Mackey would have a significant claim only if *Marchetti* and *Grosso* must be given

full retroactive sweep." 401 U. S. at 674. Justice White found that neither the purpose of the *Marchetti/Grosso* rule nor the reliability of the trial result mandated full retroactivity in *Mackey*.[37] Thus, there appear to be limits even to where a ruling is declared retroactive, short of uprooting every prior decision tangentially dependent on tainted prior law.

The implications of *Ferry* must be measured against the example furnished by *Mackey*. In *Ferry*, while meticulously limiting the scope of its holding, the Court of Military Appeals acted in conformity with the *Greenwell* rationale. *Ferry* reflects an internal administrative vigilance by courts wishing to utilize only unimpeachable convictions for enhancement of further punishment. The prohibition on the use of pre-*Greenwell* convictions to augment sentences for future infractions allows *Greenwell* to be used as a shield for court-martial defendants, but not as their sword.

But, depending on the purpose to which the old conviction is put, giving it full effect or giving it no effect might be in order. *Ferry* and its philosophical underpinnings do not, and should not, bind the courts to all-out retrospectivity with its broad ramifications.

It is also to be noted that in *Ferry* the question of the continuing effect of a pre-*Greenwell* conviction arose in the context of a direct appeal, rather than as here in a collateral proceeding. In such context, *Ferry* might be seen as standing for the proposition that to give a serviceman increased punishment now, based on a court-martial which could not be convened today, would be to continue the effect of a flawed practice. Such use of a pre-*Greenwell* convic-

37. Justice Brennan, for himself and Justice Marshall, concurred separately, stating that the use to which the information was put was not in conflict with the Fifth Amendment purpose served by not compelling its disclosure at all.

tion would surpass any interest in finality and would permit subsequent detriment to a defendant.[37a] A holding that *Greenwell* is not retroactive in the present case thus would not be inconsistent with the *Ferry* decision that limits subsequent affirmative use of prior convictions.

2. *Habeas Corpus and Retroactivity: The Context of the Present Case.*

Since it is determined that, assuming collateral attack to be permissible, automatic retroactivity is not appropriate, a weighing process must be engaged in. Beginning a decade ago, the Supreme Court proceeded to fashion a test to determine the advisability of non-retroactive application of new adjudications of constitutional dimension in criminal cases.[38] To defeat retroactivity in the criminal area a court had to draw three conclusions: the purpose of the new rule did not require retroactive application, the extent of reliance on the old practice by law enforcement officials was great, and the burden that would be imposed on the administration of justice by a holding of retro-

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37a. *See* United States v. Tucker, 404 U. S. 443 (1972); Burgett v. Texas, 389 U. S. 109 (1967).

38. Linkletter v. Walker, 381 U. S. 618 (1965); Stovall v. Denno, 388 U. S. 293 (1967). Circumstances where courts have not been reluctant to grant full retrospective application, without consideration of the *Linkletter-Stovall* factors, include situations where persons had been convicted of "conduct that cannot constitutionally be punished in the first instance," United States v. U. S. Coin & Currency, 401 U. S. 715, 723 (1971); or where, because of prior conviction for the same offense, the Double Jeopardy Clause interposed an insuperable barrier to prosecution, Robinson v. Neil, 409 U. S. 505 (1973). Retroactivity was also found where substantial detriment to the accused could be inferred that doubt was cast upon the validity of the result reached in a prior trial. Gideon v. Wainwright, 372 U. S. 335 (1963) (denial of counsel); Jackson v. Denno, 378 U. S. 368 (1964) (prejudicial material of doubtful probity coming before a jury).

activity suggested a prospective-only result.[39] *Linkletter* required that this careful calculus be performed for each new situation.[40] Retrospective application of new constitutional adjudications is now controlled by the latticework of doctrine that developed subsequent to *Linkletter* and *Stovall.*

In considering the present action in the context of habeas corpus principles, one further observation is significant: the non-constitutional nature of the defect struck down in *Greenwell.* Not every error of law can be raised in a collateral proceeding challenging the validity of a conviction. Last term, in Davis v. United States, 42 U. S. L. W. 4857 (U. S., June 10, 1974), the Supreme Court held that non-constitutional claims can be asserted in collateral attacks on criminal convictions under 28 U. S. C. § 2255. However, the Court added that the scope of relief is more narrowly circumscribed where statutory, as opposed to constitutional, claims are presented. The Court made clear that habeas may not be used as a substitute for appeal.[41]

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39. A pivotal consideration is whether the soundness of the result achieved in the prior trials is open to substantial question because of the newly ascertained constitutional defect. Johnson v. New Jersey, 384 U. S. 719 (1966); United States v. Zirpolo, 450 F. 2d 424 (3d Cir. 1971). Unlike other cases where retroactivity is warranted on this basis, *see* note 38 *supra,* in the case here no such doubt may be appropriately entertained.

40. *See e.g.,* Williams v. United States, 401 U. S. 646 (1971), holding Chimel v. California, 395 U. S. 752 (1969), not retroactive (limited search incident to arrest); DeStefano v. Woods, 392 U. S. 631 (1968), holding Duncan v. Louisiana, 391 U. S. 145 (1968), not retroactive (trial by jury).

41. 42 U. S. L. W. at 4860. To the same effect, *see* Kaufman v. United States, 394 U. S. 217 (1969); Sunal v. Large, 332 U. S. 174 (1949); Warring v. Colpoys, 74 U. S. App. D. C. 303, 122 F. 2d 642, *cert. denied,* 314 U. S. 678 (1941).

It has been suggested in dictum that non-constitutional jurisdictional defects may be raised for the first time in habeas proceedings. The fact that collateral attack is not barred does not, however, determine the outcome on the merits. *See,* Hill v. United States, 368 U. S. 424, 428 (1962); Sunal v. Large, 332 U. S. 174, 179-181 (1949).

In general, no forum is provided by section 2255 to review non-constitutional errors of law not pressed on appeal, Sunal v. Large, 332 U. S. 174 (1949), even though "failure to take a direct appeal from conviction does not deprive a federal post-conviction court of power to adjudicate the merits of constitutional claims." Kaufman v. United States, 394 U. S. 217, 220, n. 3 (1969). Indeed, total failure to raise a constitutional question at trial does not foreclose collateral habeas relief. *Kaufman, supra.*

Although the present case is not, as we have indicated, governed by the doctrines surrounding habeas corpus, their guidance is instructive. It would appear that, in general, federal *statutory* claims should be presented at trial to be available as grounds for collateral attack.

The plaintiffs assert here that it is imperative that a statutory construction by the Court of Military Appeals be applied retroactively. Yet the validity of the statute itself is not challenged in any regard. Nor is the power of the armed forces to try servicemen for the offenses in question assailed. Indeed, it is conceded that the offenses were properly triable by the military.

Also, no one questioned that the special court-martial was the proper forum in which to bring these servicemen to account. Nor is it claimed that the composition of the actual court-martial panel was improper or that the members were not qualified to preside over the individuals and offenses in question. And finally, it is not suggested that the appointment of the court-martial was by a person who, had he been personally authorized by the Secretary, could not have appointed them.

Rather, the narrow statutory decision at the core of the present controversy is that the authorization of "separate and detached," insofar as it carried the concomitant power to appoint the court-martial tribunal, was improperly

communicated by the Secretary of the Navy. The Secretary's indirect appointment, pursuant to section 0103b(5), was found to be an improper delegation of his authority as civilian head of the Navy to inferior military personnel. Far from announcing a change of constitutional magnitude that might cast doubt on the fairness of the procedure or the validity of the results in trials conducted under the old rule, *Greenwell* requires, in effect, the rerouting of authorizing papers via the Secretary when new disciplinary commands are being established.[42]

3. Retroactivity: The Balance.

Assuming the rules of habeas are applicable here, and considering that both case law and logic permit limited retroactivity, it is appropriate to turn to a determination of the extent of the retroactivity of the holding in *Greenwell*[43] under the *Linkletter-Stovall* test.[44] In this regard

42. "The Secretary, according to his attorneys, has continued to empower small units as routinely and widely as before [*Greenwell*] by his power under [10 U. S. C.] § 823(a)(7)." 365 F. Supp. 328, 348 (E. D. Pa. 1973). A letter, reproduced in Addendum to Brief of Appellee, 33c-35c, constitutes one such personal authorization from the Secretary of the Navy to roughly 40 commands empowering them to convene special courts-martial. Included therein are the commands of the two named plaintiffs in this class action (Transient Facility, Camp Smedley D. Butler, Okinawa, which court-martialed plaintiff Brown; Student Company, Marine Corps Base, Camp Pendleton, which on two occasions sentenced plaintiff Taylor after guilty pleas).

43. The district court stated its accord with the *Greenwell* result, 365 F. Supp. at 347; the correctness of the *Greenwell* decision is not before us here.

44. Linkletter v. Walker declares that "once the premise is accepted that we are neither required to, nor prohibited from applying a decision retrospectively, we must then weigh the merits and demerits in each case. . . ." 381 U. S. 618, 629 (1965). The decision must reflect concern with "the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard" the interests served by the new precept. *Id. See* Chevron Oil Co. v. Huson, 404 U. S. 97 (1971); Cipriano v. City of Houma, 395 U. S. 701 (1969).

I concur with Judge Hunter's analysis and wish only to add the following observations.

This Circuit stated in United States v. Zirpolo that "[g]enerally, rulings not primarily designed to enhance the reliability of the fact-finding or truth-determining process have not been applied retroactively."[45] No substantial claim is made that the pre-*Greenwell* practice resulted in a likelihood of trials rendered vulnerable by unreliable evidence, improper procedures or other injustice. Nothing in the record questions the fairness of either the convictions or the sentence. A holding here of nonretroactivity would thus be consonant with the views espoused in *Zirpolo*. This Court has recently applied the *Zirpolo* test in a court-martial case, holding prospective-only a ruling that struck down, on due process grounds, certain Articles of the Uniform Code of Military Justice.[46]

The rationale of the *Greenwell* rule would not be served by broad retroactive application.[47] The *Greenwell* court found that the purpose of Congress in requiring a personal designation from the Secretary in order to establish an independent disciplinary command was to retain the reins

45. 450 F. 2d 424, 432 (3d Cir. 1971). *See also* United States ex rel. Matthews v. Johnson, No. 73-1424 (3d Cir. Aug. 15, 1974). Although the majority of the Court en banc in *Matthews* did not reach the issue, the three judges who discussed retroactivity relied on *Linkletter-Stovall* and *Zirpolo*. They concluded they would not apply retroactively a ruling requiring jury instructions on voluntary manslaughter for murder defendants, although the failure to give such instructions in the past admittedly violated defendants' constitutional rights, and resulted in what might well have been unfair sentences.

46. Parker v. Levy, 478 F. 2d 772, 796 (3d Cir. 1973), *rev'd on other grounds*, 41 L. Ed. 2d 439 (1974).

47. Appellants urge, in reliance on Bell v. United States, that Congress intended a presumption to operate in favor of a serviceman, that he would receive statutory pay and allowances unless and until he was subjected to discipline by a "duly constituted court-martial." 366 U. S. 393, 402 (1961). This presumption, even if admitted, carries no implications for the question of broad retroactivity for *Greenwell*.

on special court-martial jurisdiction in the hands of the civilian Secretary of the Navy.

While prospective implementation of the *Greenwell* rule will advance the desired effect, broad application of the rule to the past, voiding all convictions, and requiring repayment of the fines and forfeitures pursuant thereto, would have no impact on furthering the results intended by Congress. All past abuses terminated with *Greenwell.* Prior designations of "separate and detached" ceased to constitute authorization for the power to convene special courts-martial.[48] Accordingly, no lingering effects are perceptible on the allocation of power within the military.[49]

Under *Linkletter-Stovall,* a court must consider the impact of a holding of retroactivity both in terms of its practical effects and the fairness of the result obtained. Were *Greenwell* held fully retroactive, the administrative burden would be considerable. Searching and correcting all applicable records would absorb substantial personnel time, and there would be problems regarding not only back pay but retirement status, veterans' benefits, and pensions.[50]

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48. *See* United States v. Cunningham, 21 U. S. C. M. A. 144 (1971) and cases cited therein. Were the plaintiffs still imprisoned under the convictions challenged here, and were they before this Court on petitions for habeas corpus, a different consideration would be introduced.

49. It is claimed that an interest does exist in curbing whatever potential abuse there is in permitting small units at the end of a chain of command to exercise such court-martial jurisdiction. We note, however, in agreement with the district court, that the statute properly construed does not alter whatever abuse might be generated by these practices. There is no change in eligibility for "separate and detached" status, and such appointments may continue to be made routinely and wholesale so long as they are made directly by the Secretary. *See* note 42, *supra.*

50. Legitimate measurement of this administrative burden is not limited, as appellants claim, to the problems surrounding relitigation of offenses. Wolff v. McDonnell, 42 USLW 5190 (June 26, 1974). Gosa v. Mayden, 413 U. S. 665, 683 (1973).

Generally, once a decision has been declared fully retroactive, convictions are overturned, records are expunged, and the defendants become subject to retrial under a proper procedure. No retrial would be possible here, however, because in almost all cases, including the two named plaintiffs in this action, those affected are no longer in the military and, persons who have left the military may no longer be subjected to military discipline.[50a] The statute of limitations might also operate as a bar. And even if retrial were available, any further proceedings would differ in no particular from the trials undergone in the first instance.[51]

The net result of according complete retroactivity to the *Greenwell rule,* especially in this case, would be to afford a windfall to the plaintiffs. Such would be unwarranted under the generally acknowledged functions to be served by making judicial determinations retroactive or by the purpose of the *Greenwell* holding itself.[52]

Thus, were full retroactivity established here, the principal results would be that a material administrative disruption would be entailed, and benefits would inure to a class that concededly has committed violations of military law.

50a. Toth v. Quarles, 350 U. S. 11 (1955).

51. Toth v. Quarles, 350 U. S. 11 (1955). Further trial would, at the very least, be difficult of achievement. Since the offenses in question were petty crimes, evidence and witnesses to prove them would doubtless be unobtainable in almost all cases. To this extent the government's legitimate interests in discipline, in deterrence, and in rehabilitation would go unsatisfied. Williams v. United States, 401 U. S. 646 (1971).

52. A serious question of inequality of treatment would arise vis-a-vis those servicemen who, by mere happenstance, were less fortunate in being tried on identical charges before substantially the same type of special courts-martial, but tribunals that were empowered under 10 U. S. C. § 823(a)(1)-(6).

III. Conclusion.

Justice Cardozo reminded us that "the inn that shelters for the night is not the journey's end." Rather, the law which is announced today must be ready for tomorrow. If we write too broadly, overturning final judgments in cases like the present one, if we apply black-letter law where circumstances require discrete case-by-case treatment, we shall place ourselves in a legal straitjacket, and be unable to deal rationally with these difficult questions as they present themselves in the future.

Because the res judicata effects of a final judgment are conclusive in the context of a civil action, and because even under a habeas approach retroactivity is not warranted, at least on the basis of the factual situation here, the requested relief may not appropriately be granted to plaintiffs.

Garth, *Circuit Judge,* dissenting,

I am obliged to dissent from Part II of the majority opinion. Like Judge Hunter, I believe that there is much "to recommend" the approach that accords full retroactivity to decisions involving the adjudicatory powers of tribunals. Unlike Judge Hunter, I do not believe that *McSparran v. Weist* [1] bars such an approach.

A. *Retroactivity and Jurisdiction*

As a general rule of jurisprudence, judicial decisions apply retroactively. *See* Comment, *Linkletter, Shott and the Retroactivity Problem in Escobedo,* 64 Mich. L. Rev. 832, 834 (1966). Nevertheless, in recent years the

1. 402 F. 2d 867 (3d Cir. 1968) (en banc), *cert. denied,* 395 U. S. 903 (1969).

"Austinian" method of restricting a decision to prospective effect has come into vogue, as the Supreme Court has striven to limit the disruptions caused by reforms in the area of criminal procedure. *See, e.g., Linkletter v. Walker,* 381 U. S. 618, 622-23 (1965) (denying complete retroactivity to *Mapp v. Ohio,* 367 U. S. 643); *Tehan v. United States ex rel. Shott,* 382 U. S. 406 (1966) (denying complete retroactivity to *Griffin v. California,* 380 U. S. 609); *Johnson v. New Jersey,* 384 U. S. 719 (1966) (denying complete retroactivity to *Miranda* and *Escobedo*); *Desist v. United States,* 394 U. S. 244 (1966) (denying complete retroactivity to *Katz v. United States,* 389 U. S. 347); *Stovall v. Denno,* 388 U. S. 293 (1967) (denying complete retroactivity to *United States v. Wade,* 388 U. S. 218 and *Gilbert v. California,* 388 U. S. 263). In *Linkletter* and its progeny, the Supreme Court developed a practical calculus for determining retroactivity-prospectivity issues. Under this approach, a court must evaluate (a) the purpose of the new rule, (b) the extent of reliance upon the old rule, and (c) the effect of applying the new rules retroactively. *See Stovall v. Denno,* 388 U. S. 293, 297 (1967). This calculus has been applied in this Circuit[2] and, indeed, was utilized by the majority in reaching its conclusions here.[3]

It is important to note, however, that the *Linkletter-Stovall* calculus is neither a panacea nor a solution to all retroactivity problems. In *Robinson v. Neil,* 409 U. S. 505, 508 (1973), the Supreme Court explained that the analysis developed in *Linkletter* and its progeny pertained to the "use of evidence" and to "particular mode[s]of trial." Decisions that do not involve such procedural matters "cannot, for retroactivity purposes, be lumped conveniently together in terms of analysis." 409 U. S. at 508.

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2. *See, e.g.,* United States v. Zirpolo, 450 F. 2d 424, 432 (3d Cir. 1971).

3. See (Judge Hunter's) Majority Opinion at 18-19.

The instant case involves no such procedural matters. At issue here is the retroactivity of a decision (*United States v. Greenwell*) which declared a particular type of tribunal incompetent to conduct special courts-martial. The Court of Military Appeals did *not* rule upon the admissibility of evidence at Greenwell's hearing. Nor did the Court of Military Appeals enter into a discussion of a recommended mode of trial. Instead, as the majority opinion here explains, the Court of Military Appeals was concerned with the illegal exercise of judicial power by a tribunal that was not authorized by Congress to conduct special courts-martial. I find nothing either in *Linkletter* or its progeny which suggests that the calculus therein adopted would apply to situations in which a tribunal is held to be incompetent to adjudicate. While the majority regards the *Linkletter-Stovall* analysis as dispositive in the instant case, I view it—on the basis of *Robinson v. Neil* —as of only peripheral importance.

In my view, decisions concerning the power of a court to adjudicate[4] (i.e. "jurisdiction," in the true sense of the word) should normally be given retroactive effect without

4. It has been suggested that the defect corrected in *Greenwell* —the improper delegation of authority by the Secretary of Navy— is too "technical" to constitute a jurisdictional error. Without minimizing the technicalities inherent in matters of personal and subject matter jurisdiction (*see, e.g.*, the technical rules that have developed to determine a corporation's citizenship for purposes of diversity jurisdiction, 1 Moore's, Federal Practice, ¶ 0.77-0.78), I regard the suggested minimization of *Greenwell* as barred by *McLaughry v. Deming*, 186 U. S. 49 (1902). In *McLaughry*, the Court was required (in a habeas corpus proceeding) to determine whether a reservist officer could be tried by a court composed entirely of officers in the Regular Army. The Court found that Congress had provided by statute that reservist officers be tried only by courts-martial composed of other reservist officers. Justice Peckham concluded:

> As to the officer to be tried there was no court, for it seems to us that it cannot be contended that men, not one of whom is authorized by law to sit, but on the contrary all of whom are forbidden to sit, can constitute a legal court-martial because de-

regard to the three-pronged test articulated in *Stovall*. A decision rendered by a military tribunal incompetent to adjudicate is a nullity. *See United States v. Cunningham*, 21 U. S. M. C. A. 144, 146 (1971); *United States v. Greenwell*, 19 U. S. M. C. A. 460, 464 (1970); *United States v. Ortiz*, 15 U. S. M. C. A. 505, 510 (1965), *petition for reconsideration denied*, 16 U. S. M. C. A. 127 (1966); *cf. McLaughry v. Deming*, 186 U. S. 49 (1902). I find it difficult to understand how such a null and void decision can be given legally operative effect merely as a result of a fortuity in timing. Indeed, were this court to sanction such a result, jurisdiction would become a matter controlled by litigation timing rather than a concept limited by Congress.

The Supreme Court has, on three separate occasions, indicated at least some support for the proposition that jurisdictional decisions should normally be given full retroactive effect. In *United States v. U. S. Coin & Currency*, 401 U. S. 715 (1971), the government initiated prosecution for forfeiture of moneys used in gambling operations, pursuant to 26 U. S. C. § 7302 (1967). After commencement of the litigation, the Supreme Court invalidated the statutes which formed the basis for the forfeiture on the grounds that the statutes infringed upon the Fifth Amendment privilege against compulsory self-incrimination. *See Marchetti v. United States*, 390 U. S. 39 (1968); *Grosso v. United States*, 390 U. S. 62 (1968). The Court held in *U. S. Coin & Currency* that *Grosso* and *Marchetti* were to be applied retroactively. This decision was reached without

4. (Cont'd.)

tailed to act as such court by an officer who in making such detail acted contrary to and in complete violation of law. Where does such a court obtain jurisdiction to perform a single official function? How does it get jurisdiction over any subject-matter or over the person of any individual? The particular tribunal is a mere creature of the statute, as we have said, and must be created under its provisions.

186 U. S. at 64.

reference to the *Linkletter-Stovall* calculus, Justice Harlan explaining that:

> Unlike some of our earlier retroactivity decisions, we are not here concerned with the implementation of a procedural rule which does not undermine the basic accuracy of the factfinding process at trial. *Linkletter v. Walker,* 381 U. S. 618 (1965); *Tehan v. Shott,* 382 U. S. 406 (1966); *Johnson v. New Jersey,* 384 U. S. 719 (1966); *Stovall v. Denno,* 388 U. S. 293 (1967). Rather, *Marchetti* and *Grosso* dealt with the kind of conduct that cannot constitutionally be punished in the first instance.

401 U. S. at 723. Admittedly, Justice Harlan makes no reference to the concept of subject matter jurisdiction. Nevertheless, it is apparent that the Court predicated its retroactivity holding upon the fact that courts are *without power* to punish the conduct proscribed by the unconstitutional gambling statutes. *Robinson v. Neil,* thoroughly discussed by the majority, similarly holds retroactive a decision (*Waller v. Florida* [5]) which limits the adjudicatory power of courts.

A case more directly on point is *Gosa v. Mayden,* 413 U. S. 665 (1973). At issue in *Gosa* was the retroactivity of *O'Callahan v. Parker,* 395 U. S. 258 (1969) (servicemen charged with "nonservice-connected" felonies are entitled to indictment by a grand jury and a trial by jury in a civilian court). The Supreme Court, reviewing decisions of the Second [6] and Fifth [7] Circuits, produced no majority

5. 397 U. S. 387 (1970).

6. In 1970, James Flemings brought an action in the Eastern District of New York seeking to compel the Secretary of the Navy to overturn a court-martial conviction for auto theft and to correct his records accordingly. The District Court, viewing the crime as non-service connected, concluded that *O'Callahan* should be applied retroactively. *United States ex rel. Flemings v. Chafee,* 330 F. Supp.

opinion and no concise resolution of the retroactivity issue.[8] Of the Justices reaching the retroactivity issue,

193 (E. D. N. Y. 1971). In reaching this conclusion, Judge Weinstein found the *Linkletter-Stovall* approach to be inapplicable, the court drawing a distinction between the jurisdictional aspects of *O'Callahan* (i.e. the holding that military courts are without *power* to resolve non-service related criminal prosecutions) and the quasi-jurisdictional/procedural aspects of *Linkletter* and its progeny. 330 F. Supp. at 199-203. The Second Circuit affirmed, concluding that:

> [t]he recent Supreme Court cases denying retrospective application to new rules of criminal procedure where and only where . . . the old rules did not threaten the basic integrity of the court's truth determining process, are not compelling precedent when applied to a case founded on the absence of jurisdiction or power over the subject or person. Not one of the cases establishing a new principle which was limited to prospective application involved a total absence of adjudicatory power. Moreover, if some decisions which were not based upon concepts of jurisdictional competence have been applied retroactively . . . *a fortiori* a case which exists on lack of jurisdiction in the traditional sense and seeks to preserve the basic integrity of the institutions which enforce our criminal laws, must be so applied.

See United States v. United States Coin & Currency. . . . 458 F. 2d at 550-51.

7. In 1969, James Roy Gosa commenced a habeas corpus proceeding in the Northern District of Florida to overturn a court-martial conviction for rape. Construing *O'Callahan* as merely a quasi-jurisdictional decision (i.e. a decision focusing upon the right to indictment by a grand jury and the right to a jury trial), the District Court applied the *Linkletter-Stovall* calculus and concluded that *O'Callahan* should *not* be applied retroactively. *Gosa v. Mayden*, 305 F. Supp. 1186 (N. D. Fla. 1969). The Fifth Circuit affirmed, though its analysis differed somewhat from that of the District Court. 450 F. 2d 753 (5th Cir. 1971). Unlike the District Court, the Court of Appeals interpreted *O'Callahan* as a "pure" jurisdictional decision (i.e. a decision focusing upon adjudicatory power). Nevertheless, the Fifth Circuit viewed it as appropriate to determine the retroactivity of the "jurisdictional" decision on the basis of the *Linkletter-Stovall* calculus.

8. The judgment of the Supreme Court affirmed the Fifth Circuit (450 F. 2d 753) and reversed the Second Circuit (458 F. 2d 544). With regard to 450 F. 2d 753, the affirmance was achieved as a result of the following split:

> a) Justices Blackmun, Burger, White and Powell concluded that *O'Callahan* should *not* be applied retroactively (413 U. S. at 672-86);

four applied the *Stovall* factors and concluded that *O'Callahan* should be restricted to prospective effect, while four others indicated that retroactivity was appropriate on non-*Stovall* grounds. Justice Marshall, writing for the latter group, concluded that *Robinson v. Neil* and *United States v. U. S. Coin & Currency* "require" retroactive application of *O'Callahan,* given the *O'Callahan* decision's focus upon jurisdiction. 413 U. S. at 700. As in *Robinson* and *U. S. Coin & Currency,* Justice Marshall wrote that in *Gosa* "we are concerned not with 'the implementation of a procedural rule,' but an unavoidable constitutional impediment to the prosecution of particular conduct." 413 U. S. at 701. He explained:

> In *O'Callahan* . . . the ultimate issue was the extent of the constitutional power that underlies the jurisdiction of military tribunals. Where an offense lies outside the limits of that power, there exists just as much of a constitutional impediment to trial by court-

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8. (Cont'd.)

b) After conceding that prior precedent (including *Robinson v. Neil, supra*) required retroactive application of *O'Callahan,* Justice Rehnquist voted to affirm nevertheless since he favored overruling *O'Callahan* as wrongly decided (413 U. S. at 692);

c) Justice Douglas voted for reargument on the issue of res judicata (413 U. S. at 686-91); and

d) Only Justices Marshall, Brennan, and Stewart voted to reverse on the grounds that *O'Callahan* should be applied retroactively (413 U. S. at 693-716).

With regard to No. 71-1398 (Second Circuit), the 7-2 reversal was achieved as a result of the following split:

a) Justices Blackmun, Burger, White and Powell concluded that *O'Callahan* should not be applied retroactively (see above);

b) Justices Douglas, Stewart, and Rehnquist concluded that *O'Callahan* was inapplicable on the ground that the automobile theft was "service-connected" (413 U. S. at 686, 692 and 693); and

c) Only Justices Marshall and Brennan voted to affirm on the grounds of retroactive application of *O'Callahan.*

> martial as there existed to a civil trial in *Marchetti* and *Grosso* due to the privilege against self-incrimination or in *Waller* due to the Double Jeopardy Clause. It cannot be forgotten that military tribunals are courts of limited jurisdiction. See *McClaughry v. Deming*, 186 U. S., at 63; *Ex Parte Watkins*, 3 Pet. 193, 209 (1830). They cannot exercise authority which Congress has not conferred upon them, much less authority which Congress is without constitutional power to confer. It is this fundamental principle that compels retroactive application of the decision in *O'Callahan*. (footnote omitted)

413 U. S. at 701-02.

In the instant case, the majority minimizes the relevance of *Robinson, U. S. Coin & Currency*, and *Gosa*. The first two cases are distinguished on the grounds that *Waller, Marchetti* and *Grosso* (but not *Greenwell*) "had the effect of ending the defendants' criminal liability." Slip Opinion at 17, n. 6. I regard the fact that Greenwell might be exposed to further proceedings as a difference, but not a meaningful distinction. As Justice Marshall suggested in his *Gosa* dissent, this difference relates merely to the "impediment to trial" at issue in the various cases. 413 U. S. at 702-03. Regardless of whether or not there could be further prosecution, in each case (including *Greenwell*), it was determined in each that the *nisi prius* court lacked the power to adjudicate the issues raised in the pleadings.

The majority deprecates the relevance of *Gosa* by concluding that the Supreme Court split 4-4 on the issue of whether jurisdictional decisions should be accorded retroactivity (without concern for the *Linkletter-Stovall* analysis). I read *Gosa* differently. I count four Justices (Marshall, Brennan, Stewart and Rehnquist) who have

concluded that jurisdictional decisions should be applied retroactively (see n. 8, supra). I can find no Justice supporting a contrary conclusion; i.e. none of the opinions filed in *Gosa* take the view that the retroactivity of jurisdictional decisions must be analyzed in terms of the *Linkletter-Stovall* calculus. The four Justices who voted in favor of prospectivity did so not as a result of the jurisdictional aspects of *O'Callahan,* but rather as a result of their characterization of that case as one dealing with procedure.[9] In short, the split was not 4-4, but rather 4-0, on the issue of whether jurisdictional decisions should be accorded full retroactivity.

I am convinced by *Robinson* and *U. S. Coin & Currency* that decisions involving the adjudicatory power of courts should normally be accorded full retroactivity. My analysis of *Gosa v. Mayden* leads me to believe that there is a strong likelihood that the Supreme Court would expressly so hold if the issue were directly before it. Inasmuch as *Greenwell* focused upon the adjudicatory power of a particular type of military tribunal, I would therefore apply it retroactively in the instant case.

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9. Indeed, Justice Marshall highlighted this characterization, stating that:

> "Mr. Justice Blackmun's plurality opinion, by its efforts to establish that *O'Callahan v. Parker,* 395 U. S. 258 (1969), was not a decision dealing with jurisdiction in its classic form, implicitly acknowledges that if *O'Callahan* were in fact concerned with the adjudicatory power—that is, the jurisdictional competency—of military tribunals, its holding would necessarily be fully retroactive in effect. . . ."

413 U. S. at 693-94. The majority opinion here rejects the suggestion that Justice Blackmun implicitly agreed that jurisdictional decisions are to be applied retroactively. The majority notes that the plurality opinion "never denied the fact that [*O'Callahan*] spoke to a jurisdictional issue." Slip Opinion at 17. While this may be true, the majority actually begs the question. There is nothing in the plurality opinion that would prevent its author from adopting Justice Marshall's position in a case that Justice Blackmun construed as involving "pure" jurisdiction.

B. McSparran *and Retroactivity*

As the majority quite properly points out, there is one major obstacle to the analysis set forth above. In *McSparran v. Weist,* 402 F. 2d 867, 877 (3d Cir. 1968), *cert. denied,* 395 U. S. 903 (1969), we stated in the course of an opinion limiting a decision to prospective effect:

> It is true that we deal here with a jurisdictional question. But the notion that "jurisdiction" is a subject of some magical quality so that a decision against jurisdiction prevents according recognition to other relevant considerations must yield to the knowledge that it is our construction of the statute which determines in the present case whether jurisdiction exists or is absent.

The majority here concluded that this passage precludes this court from ignoring the *Linkletter-Stovall* calculus. I disagree.

I find *McSparran* to be distinguishable and therefore do not see it as a bar to the above analysis. In *McSparran,* this Court was required to determine whether the appointment of a "straw" guardian solely for the purpose of creating diversity jurisdiction amounted to collusion under 28 U. S. C. § 1359.[10] Reversing prior case law,[11] this Court concluded that such "manufacturing" of diversity jurisdiction offends § 1359. 402 F. 2d at 876. Two significant distinctions are apparent to me. First in *McSparran,* but not in *Greenwell,* the *nisi prius* court had at least "facial"

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10. 28 U. S. C. § 1359 provides:

> A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

11. *See Corabi v. Auto Racing, Inc.,* 264 F. 2d 784 (3d Cir. 1959); *Jaffe v. Philadelphia & Western R. Co.,* 180 F. 2d 1010 (3d Cir. 1950).

jurisdiction. That is, in *McSparran* the apparent diversity of the parties conferred jurisdiction in the district court, subject to a later finding of collusion. In *Greenwell,* on the other hand, the improper delegation of authority deprived the special court-martial of jurisdiction *ab initio.* Secondly, it is crucial to note the difference in the operative effect of the judgments that might have issued. As discussed earlier, a judgment rendered by an improperly constituted court-martial is null and void (*see* p. 44 *supra*). In contradistinction, "a judgment based upon an erroneous finding of diversity is not void and is immune from collateral attack." *Lester v. McFaddon,* 415 F. 2d 1101, 1107 (4th Cir. 1969); *see also Noble v. Union River Logging Railroad,* 147 U. S. 165, 173-74 (1893). *McSparran's* demeaning of retroactivity in "jurisdictional" cases thus may be limited to situations in which the jurisdictional error does not vitiate the legal efficacy of the ultimate judgment.

I do concede that the passage quoted from *McSparran* does not expressly suggest the limitations which I have proposed. If the majority is correct in concluding that *McSparran* demands application of the *Linkletter-Stovall* calculus, I believe that it is time to reevaluate *McSparran's* retroactivity analysis in light of the Supreme Court's subsequent conclusions in *Robinson* and *United States Coin & Currency* and in light of Justice Marshall's uncontroverted dissent in *Gosa v. Mayden.*

Accordingly, I dissent from that portion of Part II of the majority opinion which opts for utilization of the *Linkletter-Stovall* calculus. I would reverse the District Court on the grounds that *Greenwell,* as a decision relating to adjudicatory power, must be applied retroactively.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1996

RICHARD E. BROWN, on Behalf of Himself and All Others Similarly Situated

DAVID L. TAYLOR, Intervenor Plff (7)

v.

UNITED STATES OF AMERICA

MELVIN R. LAIRD, Secretary of Defense,
JOHN W. WARNER, Secretary of the Navy,
ELMO ZUMWALT, Chief of Naval Operations,
WORTH H. BAGLEY, Chief of Naval Personnel,
R. E. CUSHMAN, JR., Commandant of the Marine Corps.
MERLIN H. STARING, Judge Advocate General of the United States Navy

Richard E. Brown and David L. Taylor,
Appellants

(D. C. Civil No. 72-635)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: ADAMS, HUNTER and GARTH, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the said cause be, and the same is hereby remanded, so that the District Court can reconsider its order defining plaintiff class, and that the judgment of the said District Court, dated September 28, 1973, be, and the same is hereby affirmed in all other respects, all in accordance with the opinion of this Court.

ATTEST:

T. F. QUINN,
T. F. Quinn, Clerk.

Dated: December 31, 1974

Certified as a true copy and issued in lieu of a formal mandate on February 10, 1975.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1996

RICHARD E. BROWN, on Behalf of Himself and all Others Similarly Situated,

v.

UNITED STATES OF AMERICA, et al.

RICHARD E. BROWN and DAVID L. TAYLOR, Appellants

Before: ADAMS, HUNTER and GARTH, *Circuit Judges*

ORDER.

It is ordered that the following changes are made in Judge Adams' concurring opinion in the above case, appearing on page 29, paragraph 2 of the slip opinion:

Lines 3-4—delete: As to a judgment challenged on direct appeal
insert: As to an initial challenge to a questionable practice

Line 9—delete: in the direct appeal

Lines 11-12—delete: after such jurisdiction has been exercised and judgment is final

Line 15—delete: a collateral attack
insert: a claim for a full retroactive effect in a

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

Dated: January 24, 1975

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 73-1996

RICHARD E. BROWN and DAVID L. TAYLOR,
On Behalf of Themselves and All Others
Similarly Situated,
Appellants,

v.

UNITED STATES OF AMERICA, et al.,
Appellees.

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEISS and GARTH, *Circuit Judges*

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons dissents from the denial of the petition for rehearing.

By THE COURT,

JAMES HUNTER, III,
James Hunter, III, *Judge.*

Dated: January 31, 1975

UNIFORM CODE OF MILITARY JUSTICE.

§ 876. Art. 76. Finality of proceedings, findings, and sentences

The appellate review of records of trial provided by this chapter, the proceedings, findings, and sentences of courts-martial as approved, reviewed, or affirmed as required by this chapter, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review, or affirmation as required by this chapter, are final and conclusive. Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies, and officers of the United States, subject only to action upon a petition for a new trial as provided in section 873 of this title (article 73) and to action by the Secretary concerned as provided in section 874 of this title (article 74), and the authority of the President.

37 U. S. C. § 204.

§ 204. Entitlement

(a) Except for members covered by section 202(i) of this title, the following persons are entitled to the basic pay of the pay grade to which assigned or distributed, in accordance with their years of service computed under section 205 of this title—

(1) a member of a uniformed service who is on active duty; and

(2) a member of a uniformed service, or a member of the National Guard who is not a Reserve of the Army or the Air Force, who is participating in full-time training, training duty with pay, or other full-time duty, provided by law, including participation in exer-

cises or the performance of duty under section 3033, 3496, 3541, 8033, 8496, or 8541 of title 10, or section 503, 504, 505, or 506 of title 32.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 23.

Class Actions

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not

request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of

absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under *Rule 16*, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1237

RICHARD E. BROWN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A43-A99), as amended (Pet. App. A102),[1] is reported

[1] Judge Adams amended one of the paragraphs of his concurring opinion on January 24, 1975 (Pet. App. A102). The paragraph set forth unamended at Pet. App. A74-A75 should thus read (508 F. 2d at 634-635, footnotes omitted):

> Based on this, plaintiffs argue that the failure to follow a statute's precise prescription makes a military judg-

at 508 F. 2d 618. The opinion of the district court (Pet. App. A1-A41) is reported at 365 F. Supp. 328.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1974 (Pet. App. A100-A101). A timely petition for rehearing was denied on January 31, 1975 (Pet. App. A103-A104). The petition for a writ of certiorari was filed on March 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the 1970 ruling of the United States Court of Military Appeals in *United States* v. *Greenwell*, 19 U.S.C.M.A. 460, 42 C.M.R. 62, that the Secretary of the Navy must act personally to authorize commanders of separate and detached commands to convene special courts-martial, should be applied retroactively to expunge convictions and grant back pay

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ment vulnerable. As to an initial challenge to a questionable practice, admittedly no fair reading of the Supreme Court cases could support a different result. Runkle v. United States and McClaughry v. Deming made clear that court-martial jurisdiction must be exercised in strict conformity with statutes, and therefore are strong support for the holding in *Greenwell*. However, extension of *Runkle* and *Deming* to the question whether retroactive operation is mandated is far from clear. In the cited cases the retroactivity issue was never raised. Hence, broad language in them regarding jurisdiction must not be read cavalierly as applying to a claim for full retroactive effect in a situation such as presently before us.

to persons convicted by such courts-martial under a prior, now invalid, delegation of authority.

2. Whether the ruling of the United States Court of Military Appeals in *United States* v. *Ferry*, 22 U.S.C.M.A. 339, 46 C.M.R. 339, that a pre-*Greenwell* special court-martial conviction may not be used to increase the sentence in a post-*Greenwell* court-martial proceeding, collaterally estops the United States from litigating the issue of *Greenwell's* retroactivity in a civil suit to expunge convictions from Naval records and for back pay.

STATUTES AND REGULATION INVOLVED

Article 23(a)(7) of the Uniform Code of Military Justice, 10 U.S.C. 823(a)(7) and the pertinent part of Section 0103b(5) of the Manual of the Judge Advocate General (as in effect at the time of petitioners' convictions) are reproduced at p. 4, *infra*.

STATEMENT

1. Petitioners Brown and Taylor, former enlisted members of the United States Marine Corps, were convicted in 1968 and 1969 of offenses under the Uniform Code of Military Justice [2] by special courts-martial convened by the commanding officers of their

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[2] Brown was convicted of aggravated arson under UCMJ Art. 126(a). Taylor was convicted on two separate occasions of absence without leave (aggregating approximately 14 months) under UCMJ Art. 86.

units.[3] The particular commanding officers were authorized to convene special courts-martial pursuant to a regulation of the Secretary of the Navy (Section 0103b(5) of the Manual of the Judge Advocate General) issued under Article 23(a)(7) of the Uniform Code of Military Justice, 10 U.S.C. 823(a)(7). Article 23(a)(7) provides:

> (a) Special courts-martial may be convened by—
>
> * * * * *
>
> (7) the commanding officer or officer in charge of any other command when empowered by the Secretary concerned.

The Secretary's regulation, JAG Manual 0103b(5), provided in pertinent part:

> [T]he following officers are, under the authority granted to the Secretary of the Navy by article 23(a)(7) of the Code, empowered to convene special courts-martial:
>
> * * * * *
>
> (5) All commanding officers and officers in charge of commands now or hereafter designated as separate or detached commands by a flag or general officer in command * * *.

Petitioners' units, pursuant to this regulation, were designated as "separate or detached commands" by

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[3] Commanding Officer, Transient Facility, Camp Smedley D. Butler, U.S. Marine Corps, Okinawa (Major D. J. Hytrek, USMC); Commanding Officer, Student Company, Schools Battalion, Marine Corps Base, Camp Pendleton, California (Major F. X. Chambers, Jr., USMC). See Pet. App. A85 n. 42.

the general officer in command in each case.[4] At that time, it was generally assumed that JAG Manual 0103b(5) was an effective and valid implementation of UCMJ Art. 23(a)(7); that commanding officers and officers in charge of commands which were in fact "separate or detached," as designated by the flag or general officer in command, were thereby empowered by the Secretary of the Navy to convene special courts-martial; and that the commanding officers of petitioners' units were, accordingly, duly authorized to convene special courts-martial pursuant to UCMJ Art. 23(a)(7). Accordingly, neither Brown nor Taylor, nor their counsel, raised any question as to the legality of the convening authority in their court-martial proceedings, either initially or on direct review.[5]

The special court-martial convictions of both Brown and Taylor became final in 1969.[6] Brown was sentenced to 6 months confinement, forfeiture of $576, and a bad conduct discharge. Taylor was sentenced to 6 months confinement, forfeiture of $420, and a bad conduct discharge.

In 1970, subsequent to the finality of the military proceedings in Brown's and Taylor's cases, the United

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[4] Commander, Marine Corps Bases, Pacific (Lieutenant General V. H. Krulak, USMC); Commanding General, Marine Corps Base, Camp Pendleton, California (Major General L. J. Fields, USMC).

[5] Present counsel for Brown and Taylor was also their counsel in the Naval review proceedings.

[6] 18 U.S.C.M.A. 643 (Brown).

States Court of Military Appeals held that JAG Manual 0103b(5) was an invalid implementation of the Secretary's empowering authority under Article 23(a)(7) of the Code. *United States* v. *Greenwell*, 19 U.S.C.M.A. 460, 42 C.M.R. 62. The court held that the Secretary of the Navy "must act *personally* in conferring the power to convene special courts-martial," and that the method of conferring such power under JAG Manual 0103b(5), through the use of flag or general officers to designate which commands were "separate or detached," constituted an unlawful delegation of the Secretary's empowering authority under Article 23(a)(7). 19 U.S.C.M.A. at 463-464.[7] The court accordingly set aside Greenwell's special court-martial proceeding as a "nullity," and remanded the case with the mandate that "a new trial may be ordered before a properly appointed court-martial." *Id.* at 464.

Following the *Greenwell* decision the Secretary of the Navy rescinded JAG Manual 0103b(5) and thereafter personally authorized the commanding officers of numerous commands (including petitioners' commands) to convene special courts-martial (usually on the basis of a formal request by the flag or general officer in command). See Pet. App. A56 n. 7, A85 n. 42.

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[7] In *Greenwell* the Secretary assumed that his Article 23(a)(7) empowering authority could not be delegated to another. He argued that JAG Manual 0103b(5) did not involve any delegation but simply established an appropriate administrative procedure for determining which commands were in fact separate or detached, and thus within the Secretary's *en bloc* conferral of jurisdiction. See Pet. App. A51 n. 5.

2. In 1972 petitioner Brown brought the present civil action seeking a ruling that the *Greenwell* decision was retroactive, that his own court-martial proceeding was a nullity, and that he was therefore entitled to recover his forfeited pay ($576) and to have his military record corrected to show an honorable discharge.[8] Petitioner Taylor intervened and sought similar relief. Petitioners also sought to have the cause certified as a class action on behalf of an estimated 20,000 other servicemen convicted by "ineffectively or improperly" convened special courts-martial from the enactment of the Uniform Code of Military Justice in 1950 to 1970 when *Greenwell* was decided.[9]

The district court held that petitioners' collateral attack on their court-martial convictions was not barred by the UCMJ finality provision (Article 76) (Pet. App. A10-A13), and that a class action was proper for those servicemen whose courts-martial were convened pursuant to JAG Manual 0103b(5), *i.e.*, from 1966 (when 0103b(5) was last amended) to 1970 (when 0103b(5) was invalidated in *Greenwell*).[10] However, on the merits, the district court,

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[8] Pet. App. A44. The Court of Military Appeals authorized only a retrial in Greenwell's case. Because Brown was an ex-serviceman in 1972, he was not subject to retrial. See Pet. App. A88 n. 50a; *Toth* v. *Quarles*, 350 U.S. 11.

[9] Complaint, paragraphs 15-18.

[10] Pet. App. A41-A42. The district court adopted October 29, 1965, as the starting date for the class. Under the court of appeals mandate this date will probably be changed to April 5, 1966. See Pet. App. A60-A61.

while recognizing that *Greenwell* was a "jurisdictional" ruling, rejected petitioners' contention that the decision should be applied retroactively, holding that (Pet. App. A40):

> [W]hen a jurisdictional defect springs from a technical failure to empower a tribunal, and that tribunal could have been properly empowered, and * * * when the mistake which led to the jurisdictional failure was a reasonable mistake, made in good faith, with no hint of an intentional improper assumption of power, or a stiff-backed resistance to the clear mandate of existing law, * * * then a court may consider applying the decision which strikes down such jurisdiction only prospectively.

In a 2-1 decision the court of appeals affirmed (Pet. App. A43-A101). Relying on a prior decision,[11] the court of appeals held that a ruling relating to jurisdiction need not *ipso facto* be applied retroactively (Pet. App. A52-A55). The court analyzed the retroactivity claim under the functional tests utilized by this Court in cases such as *Stovall* v. *Denno*, 388 U.S. 293, and held that, because *Greenwell* was concerned only with conforming the procedures for convening special courts-martial to a strict interpretation of the statute, and had no relation to the guilt-determining processes of the court-martial itself, retroactive application would serve no legitimate pur-

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[11] *McSparran* v. *Weist*, 402 F. 2d 867 (C.A. 3, *en banc*), certiorari denied *sub nom. Fritzinger* v. *Weist*, 395 U.S. 903. See Pet. App. A54.

pose (Pet. App. A56-A57). In addition the court considered that there was significant reliance by naval authorities on the pre-*Greenwell* implementation of Article 23(a)(7), and that invalidation of pre-*Greenwell* convictions in circumstances where retrial was no longer possible or practicable would have an unwarranted negative effect on the administration of justice (Pet. App. A58-A59).

In a concurring opinion (Pet. App. A61-A89) Judge Adams, analyzing the purposes of retroactivity and the factual context of this case, considered the present case weaker than *Gosa* v. *Mayden*, 413 U.S. 665, for retroactivity (Pet. App. A78) and concluded that the retroactivity of *Greenwell* sought here was not warranted (Pet. App. A89). Judge Garth in dissent (Pet. App. A89-A99) expressed his view that "a decision relating to adjudicatory power, must be applied retroactively" (Pet. App. A99).

ARGUMENT

The decision of the court of appeals treats exhaustively and soundly all aspects of petitioners' claims. Those claims were properly resolved by the court of appeals and do not call for further review by this Court. Contrary to petitioners' suggestions, there is no conflict with prior decisions of this Court, nor with the decisions of any other court. Other than the courts below, no court has ruled on the specific question involved here—whether *United*

States v. *Greenwell* should be applied retroactively to expunge convictions and grant back pay to servicemen convicted by special courts-martial invoked under pre-*Greenwell* procedures. There is no known pending or potential litigation in the lower federal courts which would be affected or eliminated by any further ruling from this Court on the retroactivity of *Greenwell*.[12] Moreover, the unique context of jurisdiction in this case and the nature of the defect make it an inappropriate vehicle to resolve more general problems of "jurisdictional" retroactivity.

1. Petitioners do not argue that they may have been unjustly convicted, or that the decision below has any significant effect on other litigation in the federal courts, or on the administration of military justice in the future. Their chief argument is the abstract contention that the decision below conflicts with various prior decisions of this Court, or, more particularly, with certain language in those decisions. Petitioners quote extensively from *Wise* v. *Withers*, 3 Cranch 331; *Dynes* v. *Hoover*, 20 How. 65; *Runkle* v. *United States*, 122 U.S. 543; *McClaughry* v. *Deming*, 186 U.S. 49; and *Ex parte Milligan*, 4 Wall. 2.

While those decisions require strict construction of military statutes relating to the composition and proceedings of courts-martial, and typically cast their holdings in jurisdictional terms, not one of them con-

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[12] There would be little likelihood of further litigation of *Greenwell's* retroactivity in other circuits, in view of the class nature of the decision. See Pet. App. A60 n. 10.

siders a question of *retroactive* application of a ruling involving a court-martial. Thus, in *McClaughry* v. *Deming*, *supra*, this Court sustained a collateral attack on the conviction of a Volunteer Army officer by a court-martial composed of Regular Army officers because a statute forbade officers of the Regular Army from sitting on courts-martial to try officers or soldiers "of other forces." The government appears to have argued that "other forces" meant other than the Army of the United States (*i.e.*, militia forces, other services, *etc.*), but not other branches of the same service (*i.e.*, Volunteer Army).[13] *Deming*, however, like the other cases cited by petitioners, was an initial attack on a particular practice; it did not involve a claim for retroactive application, although there may have been numerous past instances of the same practice. See the concurring opinion of Judge Adams (*supra*, pp. 1-2 n. 1). Since the considerations involved in determining whether a particular practice or interpretation should be changed for the future, are not necessarily the same as those involved in determining whether all past consequences, direct or indirect, of that practice should be uprooted, the cases cited by petitioners, involving an *initial* attack on a particular interpretation, do not reach the question here.[14]

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[13] See *Deming* v. *McClaughry*, 113 Fed. 639, 641, 645-646 (C.C.A. 8); 30 Stat. 361.

[14] Likewise the Manual for Courts-Martial, also relied on by petitioners (Pet. 16 n. 9), is concerned with direct review proceedings and does not purport to state the law on retroactivity questions.

2. Petitioners next argue that because this case involves a question of "pure" jurisdiction,[15] the functional tests for determining retroactivity set forth in *Linkletter* v. *Walker*, 381 U.S. 618, and in *Stovall* v. *Denno*, *supra*, are inapplicable (Pet. 17). Petitioners cite *Robinson* v. *Neil*, 409 U.S. 505, and *United States* v. *United States Coin & Currency*, 401 U.S. 715, as supporting their view. But those cases gave retroactive application to rulings of this Court ending criminal liability, as violative of the Constitution, for the persons in question (because of double jeopardy in *Robinson* and compulsory self-incrimination in *Coin & Currency*).[16] In the present case, in contrast, individuals whose courts-martial were convened pursuant to the regulations struck down in *Greenwell* are, so far as *Greenwell* is concerned, fully

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[15] The term "pure" jurisdiction is a label used by petitioners. The decision in *Greenwell* does not use that phrase. The court of appeals characterized *Greenwell* as involving a "jurisdictional issue" (Pet. App. A57 n. 7a) but analyzed that decision in terms of its purpose (Pet. App. A56-A57). See also the concurring opinion at Pet. App. A65 and the opinion of the district court at Pet. App. A30-A34. Additionally see F. S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L. Rev. 809 (1935).

[16] In *Robinson* this Court held that retroactivity was required because the effect of the double jeopardy clause "is to prevent a trial from taking place at all * * *." 409 U.S. at 509. In *Coin & Currency* the Court explained that its prior rulings striking down statutory provisions which had the effect of compelling gamblers to file self-incriminating statements "dealt with the kind of conduct that cannot constitutionally be punished in the first instance," *i.e.*, conduct that was constitutionally immune from punishment." 401 U.S. at 723, 724.

subject to retrial.[17] See Pet. App. A55 n. 6. *Greenwell* dealt only with the correct manner by which the Secretary of the Navy could confer a clearly existing power on an otherwise appropriate court (Pet. App. A56). Unlike the situation in *Robinson* and *Coin & Currency*, *Greenwell's* purpose was not to establish immunity from prosecution or further prosecution; there is, accordingly, no such purpose to vindicate through retroactive application of *Greenwell*.[18]

Petitioners' reliance on *Gosa* v. *Mayden*, 413 U.S. 665, involving retroactivity of *O'Callahan* v. *Parker*, 395 U.S. 258, is likewise misplaced. The plurality opinion in *Gosa* did not deny that the actual effect of *O'Callahan* was to deprive *all* military courts of jurisdiction to convict servicemen for offenses which are not service connected. *Greenwell* on the other hand, deals only with the proper invocation of an authority admittedly existing. It therefore presents

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[17] Brown and Taylor are presently immune from retrial, not because of *Greenwell*, but because they are no longer in the service. See *Toth* v. *Quarles*, 350 U.S. 11.

[18] The government doubts the correctness of *Greenwell* and contested its correctness in the district court, although not in the court of appeals. See Pet. App. A85 n. 43. If certiorari should be granted, the government would reserve its right to argue in the alternative that the court of appeals decision should be affirmed on the ground that *Greenwell* was incorrectly decided, *i.e.*, that JAG Manual 0103b(5) did not constitute an unlawful delegation of the Secretary's convening power under UCMJ Art. 23(a)(7). See *Gosa* v. *Mayden*, 413 U.S. 665, 692 (Rehnquist, J., concurring); *Dandridge* v. *Williams*, 397 U.S. 471, 476 n. 6.

a far less compelling case for retroactivity than *O'Callahan*.

Bell v. *United States*, 366 U.S. 393, relied upon by petitioners (Pet. 20-22) is not controlling. There the Court held that prisoners of war could not be denied military pay on allegations that they had aided the enemy where they had not been court-martialled at all. No question of retroactively setting aside a proceeding arguably valid when held was involved. See Pet. App. A86 n. 47 (concurring opinion of Judge Adams).

3. Petitioners argue that the decision of the court of appeals conflicts with the decision of the Seventh Circuit in *Brough* v. *United States*, 454 F. 2d 370.[19] In *Brough* the Seventh Circuit held retroactive a ruling by this Court (*Toussie* v. *United States*, 397 U.S. 112) that the 5-year statute of limitations for failure to register for the draft ran from the date the offense began, *i.e.*, from 5 days after an individual's 18th birthday. The effect of *Toussie* was thus to end an individual's criminal liability for this offense 5 days after he reached age 23, unless prosecution had been commenced. The Seventh Circuit held that convictions of similarly situated previously-convicted individuals should also be set aside.

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[19] *Brough* was relied on by petitioners in a footnote of their court of appeals brief for the Blackstonion proposition that a judicial ruling declares the law as it "always was" (Br., p. 26 n. 31). Compare *Linkletter* v. *Walker*, 381 U.S. 618, 622-629; Chafee, *Do Judges Make or Discover Law?*, 91 Proc. Am. Philos. Soc. 405 (1947).

In its *opinion* the Seventh Circuit stated that while Constitutional decisions may or may not be retroactive (because of the development of the meaning of the Constitution), statutory interpretations must always be retroactive because "a statute * * * can have only one meaning." 454 F. 2d at 372. The *decision* in *Brough*, however, is necessarily less broad and the decision is not in conflict with the decision here. As we noted earlier, *Greenwell* did not end the criminal liability of a class of individuals. *Toussie* did. The purpose of *Toussie* thus presented a far more compelling case for retroactive application than did the ruling in *Greenwell*. The two cases are wholly distinguishable in the factual situations and statutes considered. The holdings in *Brough* and this case, accordingly, present no occasion for this Court to exercise its power to resolve conflicts among the courts of appeals.[20]

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[20] Nor is there any conflict with *Donivan* v. *Henderson*, 506 F. 2d 434 (C.A. 5), holding retroactive this Court's decision in *Wingo* v. *Wedding*, 418 U.S. 461, that magistrates (non-Article III judges) could not conduct evidentiary hearings in *habeas corpus* cases. The court of appeals in *Donivan* applied the functional tests set forth in *Stovall* and concluded that "the factors supporting retroactivity weigh heavier in the balance." The court of appeals was "[p]articularly swayed by the purpose to be served by *Wingo*—proper finding of facts crucial to the truth." 506 F. 2d at 435. This reasoning is fully consistent with the opinion of the court of appeals in this case—that *Greenwell's* purpose "was not intended to improve the fact-finding procedures employed at the court-martial itself" (Pet. App. A57). See also *Daniel* v. *Louisiana*, No. 74-5369, decided January 27, 1975.

4. Finally, petitioners argue that under principles of collateral estoppel the court of appeals should have held *Greenwell* fully retroactive on the basis of *United States* v. *Ferry*, 22 U.S.C.M.A. 339, 46 C.M.R. 339, in which the Court of Military Appeals ruled that a pre-*Greenwell* conviction could not be used to increase a sentence in a post-*Greenwell* court-martial.

The court of appeals, however, correctly held that *Ferry* did not collaterally estop the government from defending against the broad retroactivity of *Greenwell* asserted by petitioners in this case (Pet. App. A47-A49, see also A79-A82).[21] In the first place, the court in *Ferry* in deciding that a past conviction by a court-martial convened contrary to *Greenwell* could not be used to increase a sentence in a pending case, expressly declined to decide what "effect *Greenwell* may have on a conviction in other situations" (Pet. App. A48; 22 U.S.C.M.A. at 340).

Moreover, *Ferry* decided an issue of law, not an issue of fact or mixed fact and law. This Court stated in *United States* v. *Moser*, 266 U.S. 236, 242:

> [T]he doctrine of *res judicata* * * * does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases.

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[21] The court of appeals was unanimous that the government was not barred by collateral estoppel.

For both of these reasons the *Ferry* ruling does not effect a collateral estoppel in the present case.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

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